in the

Supreme Court

of the

United States

October Term, 1978

NO. 78-844

KENNETH A. PLANTE, DEMPSEY J. BARRON, PHILIP D. LEWIS, JACK D. GORDON, and JON C. THOMAS,

Petitioners,

vs.

LARRY GONZALEZ as Executive Director of the Florida Commission on Ethics; BRUCE SMATHERS, as Secretary of State of Florida; THE FLORIDA COMMISSION ON ETHICS; and REUBIN O'D ASKEW, as Governor of the State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered June 30, 1978; petition for rehearing *en banc* denied on August 31, 1978.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Florida dismissing the Complaints alleging invalidity of Art. II, §8, Fla. Const. under privacy guarantees of the Fourteenth Amendment, for failure to state a claim for relief, is dated September 14, 1977. It is reported at 437 F.Supp. 536 (N.D. Fla. 1977) and is set forth in the Appendix at page 1.

The decision of the United States Court of Appeals for the Fifth Circuit affirming the Order of the District Court *(Plante v. Gonzalez)* is reported at 575 F.2d 1119 (5th Cir. 1978) and is set forth in the Appendix at Page 15.

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[1]Plaintiffs (Petitioners) in District Court Case No. 77-0852 were Florida Senators Plante, Barron, Lewis, Gordon and *William D. Gorman*. Plaintiff (Petitioner) in District Court Case No. 77-0868 was Senator Jon C. Thomas. The suits were consolidated. Senator Gorman was dismissed as a party when he complied with the financial disclosure requirement of Art. II, §8(a), Fla. Const.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was entered on June 30, 1978. A timely Petition for Rehearing *en banc* was denied on August 31, 1978, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a State may, consistent with Fourteenth Amendment guarantees of "the individual interest in avoiding disclosure of personal matters" require not only the recording, but the *Public Disclosure,* of economic and financial interests *(defined as including net worth statements identifying and evaluating each asset and liability in excess of $1,000.00; and either the most recent Federal income tax return or a statement showing all sources of income in excess of $1,000.00)* as a condition of seeking and holding public office?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. The Ninth Amendment to the Constitution of the United States:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

B. The Fourteenth Amendment to the Constitution of the United States, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Article II, Section 8, of the Florida Constitution

> Ethics in Government. — A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (a) *All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.*
>
> (b) All elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances.
>
> (c) Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the State for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law.

(d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.

(e) No member of the Legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No member of the Legislature shall personally represent another person or entity for compensation during term of office before any State agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law.

(f) There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.

(g) This section shall not be construed to limit disclosures and prohibitions which may be established by law to preserve the public trust and avoid conflicts between public duties and private interests.

(h) Schedule — On the effective date of this amendment and until changed by law:

(1) *Full and public disclosure of financial interests shall mean filing with the Secretary of State by July 1 of each year a sworn statement showing net worth and indentifying each asset and liability in excess of $1,000 and its value together with one of the following:*

a. *A copy of the person's most recent federal income tax return; or*

b. *A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in sub-section (f), and such rules shall include disclosure of secondary sources of income.*

(2) *Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to sub-section (h) (1).*

(3) *The independent commission provided for in sub-section (f) shall mean the Florida Commission on Ethics.*

STATEMENT OF THE CASE

On January 4, 1977,[2] the "Sunshine Amendment" was added to Florida's Constitution as Art. II, §8. It declared a public office to be a public trust. To assure the right of the people to "secure and sustain that trust against abuse" it requires full and public disclosure of both personal financial interests (§8(a)) and campaign finances (§8(b)) from public office holders and candidates for office; prohibits legislators from representing third persons before state agencies (other than judicial tribunals) while in office (§8(e)); imposes penalties for breach of the public trust (§8(c)) and (d); and establishes an independent commission (The Florida Commission on Ethics)[3] to "conduct investigations and make public reports on all complaints concerning breach of public trust by public officers . . . ." (§8(f)).

[2]Art. XI, §3, Fla. Const., reserves to the people the right to propose amendments to the State Constitution through the initative process. Following a successful petition campaign, the "Sunshine Amendment" was placed on the ballot, and thereafter approved by the voters on November 2, 1976. It became effective on "the first Tuesday after the first Monday in January following the election." (January 4, 1977), Art. XI, §5(c), Fla. Const.

[3]§8 (h) (3) of the Amendment establishes the Florida Commission on Ethics as the independent agency, "until changed by law." This commission was created in 1974 (Ch. 74-176, Laws of Florida) "to serve as guardian of the standards of conduct for the officers and employees of the State. . . ." §112.320, Fla. Stat. Its initial duty was to oversee the requirements of the Code of Ethics (Ch. 74-177; §§112.311-112.317, Fla. Stat.). Dissatisfaction with the reach of this legislation gave impetus to an initiative (Art. XI, §3, Fla. Const.) that added Art. II, §8 to the State Constitution and an overlay of constitutional duties on the Commission.

This litigation involves the validity of §8(a) of the Amendment, which requires that:

> All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.

Full and public disclosure of personal financial interests is defined by §8(h)(1) of the Amendment as the recording by incumbents and candidates for office of a sworn net worth statement, identifying each asset and liability in excess of $1,000.00 and its value; together with either the person's most recent Federal income tax return or a sworn statement identifying each separate source and amount of income in excess of $1,000.00. The documents are recorded in the office of the Secretary of State and are to be supplemented each July 1. They are public documents. Copies are available to all persons upon request. The recorded financial interests of those in office on July 1, 1977 and those who sought office in the elections of 1978 have been greatly publicized by the press, much of it in contrasting columns. (App. pp. 73 to 76)

On July 10, 1977, just prior to the effective date of the recording and publication requirements of the

Amendment, five State Senators[4] stated that they would decline to record their personal financial documents with the Secretary of State under circumstances which required the immediate publication of their contents to the public. Suit was instituted in the United States District Court for the Northern District of Florida seeking a declaration that §8(a) of the Amendment violated their constitutional rights of privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

The Senators asserted that the liberty right, guaranteed by the 14th Amendment, of freedom from compulsory public disclosure of personal financial matters, may be overborne only when a two-fold test is met.

[4]Florida legislators are part-time officials, who are paid $12,000 a year.

> To apply newly-created professional limitations *on a part-time Florida legislator* in the midst of his term of office obviously defeats expectations honestly arrived at when the office was initially sought. The office itself is not abrogated or its duties altered, of course, but the privileges of officeholding are no less impaired by curtailing the non-legislative employment opportunities than they would be if the office was made full-time and outside employment prohibited altogether.

Myers v. Hawkins, Case No. 53, 639, (9/14/78) FLW, SCO 431, 434 (App. 63.)

Regular sessions of the Florida Legislature are limited to 60 days a year. Art. III, §3, Fla. Const. As set forth in their Complaints, the five Senators earn their livelihoods in private occupations, including those of lawyer, rancher, realtor, savings and loan executive and family (rendering) business.

The government must show that sufficient compelling state interests predominate and it must employ narrowly tailored methods to achieve those ends so as to constitute the least impairment of protected rights.[5]

The State has a vast concern in deterring corruption and conflict of interests in public life; in creating confidence in public officials; and in detecting and prosecuting those who violate the public trust. These interests are sufficient to compel the *recording* of intimate financial and economic data by those who seek or hold public office. Recordation with an independent State Commission, entrusted with the responsibility of conducting investigations, use of the subpoena power, and the right to publicize and take action upon probable

[5]Even a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

Buckley v. Valeo, (1976) 424 U.S. 1, 46 L.Ed.2d 659, at 691, 96 S.Ct. 612, at 638.

cause findings of any breach of the public trust, will completely vindicate all legitimate state interests.[6]

[6]Section 112.322(4)-(7), Fla. Stat. provides the Commission on Ethics with wide investigative and enforcement powers:

. . . . .

(4) The Commission has the power to subpoena, audit, and investigate. The commission may subpoena witnesses and compel their attendance and testimony, administer oaths and affirmations, take evidence, and require by subpoena the production of any books, papers, records, or other items relevant to the performance of the commission's duties or exercise of its powers. In the case of a refusal to obey a subpoena issued to any person, the commission may make application to any circuit court of this state which shall have jurisdiction to order the witness to appear before the commission and to produce evidence, if so ordered, or to give testimony touching on the matter in question. Failure to obey the order may be punished by the court as contempt. Witnesses shall be paid mileage and witness fees as authorized for witnesses in civil cases.

(5) The commission may recommend that the Governor initiate judicial proceedings in the name of the state against any executive or administrative state, county, or municipal officer to enforce compliance with any provision of this part or to restrain violations of this part, pursuant to s. 1(b), Art. IV of the State Constitution, and the Governor may without further action initiate such judicial proceedings.

(6) The commission is authorized to call upon appropriate agencies of state government for such professional assistance as may be needed in the discharge of its duties. The Department of Legal Affairs shall, upon request, provide legal and investigative assistance to the commission.

(7) It shall be the further duty of the commission to submit to the Legislature from time to time a report of its work and recommendations for legislation deemed necessary to improve the code of ethics and its enforcement.

However, the *publication* of such data, in the absence of probable cause findings of wrongdoing, serves no function other than gratification of prurient curiosity. It is disclosure for disclosure's sake alone. It is an aid only to newspaper sales and rumormongery. One major newspaper reported the net worth and assets of local officials and judges under the heading "Juicy Gossip from Tallahassee". See *Palm Beach Post* dated August 7, 1977. The public has no more "right to know" the details of an innocent candidate's financial affairs than it has the right to compel the publication of his reading materials, church attendance, medical records, sex preferences, organizational memberships or daily intake of alcohol or calories. Nor does the public have the capability of policing the financial information that is thrust upon it. No relationship between publication of financial data and integrity in government has been established or even attempted. In the two years since public exposure of personal finances has been imposed on thousands, not a single case of breach of trust has been forwarded by the public to the commission for action (other than, as in the case of the Petitioners, for failure to file).

On the other hand, compulsory financial disclosure shreds the privacy rights of public officials, their families and all who associate with them in business.

It is a truism to suggest that"[f]inancial transactions can reveal much about a person's activities, associations and beliefs."[7] This becomes apparent upon examination of the contents of those documents which

[7]*California Bankers Ass'n. v. Shultz*, (1974) 416 U.S. 21, 78, 94 S.Ct. 1494, 39 L.Ed.2d 812, 850.

must be opened to public scrutiny as a condition of seeking or holding public office. The financial statements are not restricted to matters related to the officeholder's sphere of influence, rather, total personal economic disclosure is required, no matter how irrelevant to the nature of the officer's duties. Professional aspirants to office are required to reveal the names of and amounts of payment from the clients of attorneys, the patients of physicians and psychiatrists and the prescription drug users of pharmacists. Partners and other associates in business transactions must be identified, including the amounts and percentages of their participation, regardless of whether or not the business venture occurs within the State or is subject to its regulation. The entire contents of an investment portfolio and its decisions on sales and purchases must be shown. Details are also exposed concerning alimony, child and parental support, political and charitable contributions, and attendance upon the services of psychiatrists, social workers, lawyers and other professionals.

Since there was a natural interest in avoiding disclosure of such personal matters without a showing that less intrusive methods were unworkable, the Senators requested a hearing on their Complaint to establish that, on balance, the satisfaction of legitimate government needs does not require the end of financial privacy of persons in public life.

The District Court dismissed the Complaints[8] finding that since there was no "fundamental right of privacy inherent in the personal financial affairs of public officers" (App. p. 5), there was no need to invoke the "less drastic means" (App. p. 5) analysis sought by the Senators.

The Court of Appeals for the Fifth Circuit affirmed the ruling but on different grounds. Contrary to the lower tribunal, it found that "Americans have a constitutional right to privacy. . . . " *Plante v. Gonzalez*, (5th Cir. 1978) 575 F.2d 1119, 1127; ". . . [the Senators'] contentions do fall directly within this right. . . ." *Id.* at 1132; " . . . [p]rivacy of personal matters is an interest in and of itself, protected constitutionally . . . and at common law . . . " *Id.* at 1135.

[8]It appearing to a certainty that the plaintiffs cannot prevail under any state of facts which could be proved in support of their claim, it is Ordered that the defendants' motions to dismiss are granted, and the plaintiffs' complaints in support of a declaratory judgment are hereby dismissed with prejudice.

(Order of District Court, App. p. 14).

The Court of Appeals "balanced"[9] this privacy right against public interests and found the latter to be dominant — a conclusion never denied, nor controverted here by the petitioners. The Court, acknowledging that this conclusion "does not end our inquiry" *Id.* at 1136, then turned its attention to the *least restrictive means* analysis and considered the Senators' contention "that the State's interests would be served just as well by limiting disclosure to the Florida Commission on Ethics." *Plante* supra, 575 F.2d, at 1137[10] The court concluded that the "difficult questions . . . presented by the Senators . . . are questions of law, not of fact" and "that no law exists to support the Senators' complaint." *Plante*, supra 575 F.2d, at 1137-1138.

> Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger. We join the majority of courts considering the matter and conclude that mandatory financial disclosure for elected officials is constitutional.
>
> *Plante*, supra, 575 F.2d at 1136.

STATE LITIGATION INVOLVING PETITIONERS

Senators Plante and Thomas were elected to four year terms in November, 1974. Senators Barron, Gordon and Lewis were elected to four year terms on November 2, 1976 and took office "upon election" (Art. III, §15(d), Fla. Const.) Thus, all Petitioners were incumbents on January 4, 1977, the effective date of Art. II, §8, Fla. Const. On February 15, 1978, the Florida Commission on Ethics declared the Senators guilty of having breached the public trust for failure to record their economic resources as required by §8(a) of the Amendment. On April 6, 1978, the District Court of Appeal of Florida, First District, reversed the Commission's order on the ground that the Commission had no jurisdiction over Senators by virtue of Art. III, §2, Fla. Const., establishing each house as the sole judge of the qualifications of its members. *Plante v. Florida Commission on Ethics*, (Fla. 1st DCA, 1978) 356 So.2d 1353. Neither the validity of the Amendment under the Federal Con-

[9]Although in the autonomy strand of the right to privacy, something approaching equal protection "strict scrutiny" analysis has appeared, *we believe that the balancing test, more common to due process claims, is appropriate here. The constitutionality of the amendment will be determined by comparing the interests it serves with those it hinders.*

At the same time, scrutiny is necessary. The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be demonstrated. Otherwise, public disclosure requirements such as Florida's could be extended to anyone, in any situation.

Plante v. Gonzalez, (5th Cir, 1978) 575 F.2d 1119, at 1134 (emphasis supplied).

[10]The senators' final complaint is that the State's interests would be served just as well by limiting disclosure to the Florida Commission on Ethics. This could deter some corruption, restore some public confidence, and detect some malfeasance. But the Florida voters have decided that it could not provide the voting public with the valuable information public disclosure creates; something more is needed. This educational feature of the Amendment serves one of the most legitimate of state interests: it improves the electoral process. That goal, recognized as important by the Supreme Court in *Buckley*, can be met in no other way. That goal justifies public publication of the Senators' financial statements.

Plante v. Gonzalez, 575 F.2d 1119, at 1137.

stitution nor its *retrospective* applicability to incumbents under state law were issues in the proceeding. The Commission's appeal of this Order is pending before the Supreme Court of Florida.

On September 14, 1978, in *Myers v. Hawkins*, Case No. 53,639, 1978 FLW, SCO 431 (App. p. 63) the Supreme Court of Florida held that the Amendment's (§8(e)) prohibition against a State Legislator's appearance before State agencies while in office was inapplicable to incumbents as of January 4, 1977.

Thereafter, on October 6, 1978, the Supreme Court of Florida ordered the parties to these proceedings to submit briefs on the issue of the applicability of the financial disclosure requirements of §8(a) to the Petitioners in light of its decision in *Myers, supra.* Argument is scheduled for December 5, 1978.

Even if the Supreme Court of Florida were to hold that the Petitioners were not under obligation to publish their financial resources in July, 1977, the ripeness of this controversy would not be impaired. Although Senators Plante and Thomas declined to seek re-election (their terms expired November 7, 1978) and Senator Lewis has not made a decision as to his future plans, Senators Barron and Gordon have advised counsel of their intention to seek re-election, absent the bar of the financial disclosure requirement. Their concerns, therefore, are more than merely hypothetical. The Amendment's operation against them is imminent and real. They will be subject to the Amendment's disclosure requirements not later than the time for qualifying in July, 1980. If these Senators were obliged to defer action until then, under no reasonably foreseeable cir-

cumstances could they obtain review in advance of the November election and would thus be barred from both the ballot[11] and the office. The status of the state litiga-

[11]The amendment by its terms requires the filing of the financial data with the Secretary of State "by July 1 of each year" Art. II §8(h) (1) Fla. Const. §100.061 F.S., establishes "the first Tuesday that falls on the 6th day or later in September of each year in which a general election is held" as the date of the first primary for nomination of candidates of political parties. §99.061 F.S. states that the first date for qualifying "shall be the 63rd day prior to the first primary". In 1978 the first primary date was September 12th; and the earliest time for qualifying was July 11, 1978. The Secretary of State's opinion that the Amendment did not apply to non-incumbent candidates for office was contested. In *State of Florida ex rel Common Cause, et al, v. Bruce A. Smathers as Secretary of State, et al,* Case No. 78-1724 in the Circuit Court for Leon County, Florida, the Circuit Court overruled the secretary as follows:

> This Court is also of the opinion that the inclusion of the July 1 date in Section 8(h) as a filing deadline does not operate to relieve a non-incumbent candidate for elected constitutional office of the more stringent disclosure requirements of Section 8(h) simply because he does not become a candidate until after July 1. To hold otherwise would be to ignore the intent so clearly expressed in Sections 8(a) and (h). Moreover, such a strict construction would not comport with the rule of reason that is basic to all constitutional interpretation.
>
> If Intervenor Plante is correct in his interpretation of Section 8(h) a non-incumbent candidate for elected constitutional office who became a candidate after July 1 of an election year would never be required *as a candidate* to fully and publicly disclose his or her financial interests. If successful in his or her campaign for office, he or she would not fully and publicly disclose until after some six (6) months into his or her term of office. If unsuccessful, it could hardly be urged that he or she was yet a candidate for elected constitutional office, come the following July 1.

State ex rel Common Cause v. Smathers, supra, pp. 5-6 (emphasis in original).

This decision is on appeal to the Supreme Court of Florida.

tion and its potential for a *temporary* resolution of the controversy should therefore not bar consideration of this Petition. *Buckley v. Valeo,* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659; *Regional Rail Reorganization Act Cases,* (1974) 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320.[12]

[12]In *Buckley v. Valeo,* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 the plaintiffs included a *candidate* for the presidency, an incumbent U.S. Senator who was a *candidate* for re-election. The court stated:

> In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth . . . [cite]
>
> *Buckley v. Valeo,* supra, 96 S.Ct., at 631, 46 L.Ed.2d, at 683.

In *Regional Rail Reorganization Act cases,* (1974) 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320, the court stated:

> "Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."
>
> *Regional,* 419 U.S., at 143, 42 L.Ed.2d, at 353.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THERE IS A FOURTEENTH AMENDMENT BAR TO STATE LAWS REQUIRING DISCLOSURE OF PERSONAL FINANCIAL INTERESTS AS A CONDITION OF HOLDING PUBLIC OFFICE, IS A FEDERAL QUESTION OF GREAT SIGNIFICANCE TO THE NATION'S ELECTORAL SYSTEM THAT HAS NOT BEEN, BUT WHICH SHOULD BE, DECIDED BY THE SUPREME COURT.

The past decade has witnessed a proliferation of laws attempting to advance the integrity of the electoral process at both State and national levels. These enactments fall into two broad categories. In the first set are the laws relative to *campaign financing,* which seek to impose restrictions on contributions to and expenditures by candidates in their efforts to secure and retain public office. The second sphere of legislation is directed toward the elimination of conflicts between private gain and the public good by imposing a variety of obligations upon candidates and office holders, including *public disclosure of personal finances,* and restrictions on outside compensation and employment.

Both groups of laws raise constitutional questions of the gravest importance. In meeting the heightened demands of citizens that deficiencies in election codes be corrected to provide for less expensive election campaigns and more open and honest government, there has been a concomitant curtailment of the speech, associa-

tion and privacy guarantees of public officials and candidates for office. The issue of whether these reform laws are valid exercises in the societal interest, or cut impermissible swathes across personal liberties, is one which requires Supreme Court determination.

The validity of the first group of these laws has already been decided. When Congress enacted the Federal Election Campaign Act of 1974[13] it acknowledged the constitutional proportion of the competing interests involved by providing an expedited

[13]Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 11, as amended, Federal Election Campaign Act Amendments of 1974, Pub.L. No. 93-443, 88 Stat. 1272. Generally, 2 USCA §§431, *et seq.*; 18 USCA §§591 *et. seq.*

review procedure within the Act itself.[14] In *Buckley v. Valeo,* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, the Supreme Court declared the statute's limitations on a candidate's contributions of his own funds towards his campaign,[15] as well as the ceiling on campaign

[14]2 U.S.C. §437 h. (§315(a) of the Federal Election Campaign Act) provides:

> §437 h. Judicial Review
> (a) The Commission, the national committee of any political party of any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

[15]Section 608(a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms.

Buckley v. Valeo, supra, 96 S.Ct., at 651, 46 L.Ed.2d, at 707

spending[16] to be invalid. Governmental interests in electoral improvement were held insufficient to warrant the resultant limitations on candidates for public office and their First Amendment guarantees of free speech.

> [T]he First Amendment requires the invalidation of the Act's independent expenditure ceiling, §608(e)(1), its limitation on a candidate's expenditures from his own personal funds, §608(a), and its ceilings on overall campaign expenditures, §608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.
>
> *Buckley v. Valeo,* supra, 424 U.S. 1, 96 S.Ct., at 653-654, 46 L.E. 2d, at 710.

The validity of the second group of the laws, those requiring public disclosure of financial interests as a

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[16]We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify §608(e)(1)'s ceiling on independent expenditures.

. . . .

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression.

Buckley v. Valeo, supra, 96 S.Ct., at 647, 648, 46 L.Ed.2d, at 702, 704.

means of enhancing the honesty of public officials and insuring integrity in government, has not yet been authoritatively decided by the Supreme Court.[17] Indeed the decision by the Court of Appeals below is the first federal decision on this question.[18]

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[17]This Court has dismissed for want of a substantial federal question, appeals from three state court decisions upholding the recording and public disclosure statutes of those state: *Montgomery County v. Walsh,* (Md.App. 1975) 274 Md. 489, 336 A.2d 97, *app. dism'd,* (1976), 424 U.S. 901, 96 S.Ct.1091, 47 L.Ed.2d 306; *Fritz v. Gorton,* (Wash. 1974) 83 Wash.2d 275, 517 P.2d 911, *app. dism'd,* (1974), 417 U.S.90, 94 S.Ct. 2596, 41 L.Ed.2d 208; *Stein v. Howlett,* (Ill. 1972) 52 Ill.2d 570, 289 N.E.2d 409, *app. dism'd.,* (1973), 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152.

The Court of Appeals found that the summary dismissals and the teachings of *Hicks v. Miranda,* (1975) 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223, did not bar its consideration of the Senators' claim since Florida's requirements are factually different from those dismissed by this Court. *Mandel v. Bradley,* (1977), 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199. Moreover, the requirements of *Hicks v. Miranda* upon lower tribunals has no bearing upon whether the Supreme Court should consider a cause.

This Court also declined to review, by certiorari, *Illinois State Employees Ass'n v. Walker,* (Ill.1974), 57 Ill.2d 512, 351 N.E.2d 9, cert denied sub nom., *Troopers Lodge No. 41 v. Walker,* (1974), 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656. (Justices Blackmun and Powell would have granted certiorari).

[18]*O'Brien v. DiGrazia,* (1st Cir. 1976), 544 F.2d 543, cert. denied sub nom., *O'Brien v. Jordan,* (1977) 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223, did not involve public disclosure of personal financial information. There the Court of Appeals for the First Circuit found no constitutional infringement when police officers, who had been linked with organized crime, were required by order of the Boston police commissioner to report, *but not disclose to the public-at-large,* their families' income sources, assets, approximate expenditures and to furnish copies of their federal or state income tax return.

These laws are equally open to significant challenge on First and Fourteenth Amendment grounds, since in their operation they puncture the evanescence we call privacy, exposing the intimate details which compose the special personhood of each American. These laws invade and harm privacy interests of public officials in the 41 states,[19] and the Federal jurisdiction[20] which now re-

[19]Ala. Code Tit. 55, §327(8)
Alaska Stat. §39.50.010
Ariz. Rev. Stat. §38-541
Ark. Stat. Ann. §12-3001
Cal. Gov't Code §3600 (West)
Cal. Gov't Code §87200 (West)
Colo. Rev. Stat. §24-6-201
1977 Conn. Pub. Acts 77-600
Del. Code Tit. 29, §5851
Del. 1977 Executive Order No. 1
Fla. Const. — 1968 Revision — Art. II, §8
Fla. Stat. §112.311
Haw. Rev. Stat. §84-1
Ill. Const. of 1970, Art. 13, §2
Ill. Ann. Stat. ch. 127, §601-101 (Smith-Hurd)
Ill. 1973 Executive Order No. 4
Ill. 1977 Executive Order No. 3
Ind. Code Ann. §4-2-6 (Burns)
Iowa Code Ann. §68B.1 (West)
Kan. Stat. Ann. §46-215
Ky. Rev. Stat. §61.710
La. Rev. Stat. Ann. §1101 (West)
Me. Rev. Stat. Tit. 1, §1001
Md. Ann. Code Art. 33, §29-1
Md. 1969 Executive Order Art. 41
Md. 1974 Executive Order Art. 33
1978 Mass. Adv. Legis. Serv. Ch. 210
1978 Mass. Adv. Legis. Serv. Ch. 268B
Minn. Stat. §10A.01
Mo. Ann. Stat. §130.010 (Vernon)
Neb. Rev. Stat. §49-1101
Nev. Rev. Stat. §528
N.J. 1975 Executive Order No. 15
N.M. Stat. Ann. §5-12-1
N.Y. Exec. Law §74
N.Y. Pub. Off. Law §73
N.Y. Legis. Law §80
N.Y. 1975 Executive Order No. 10
N.Y. 1976 Executive Order No. 10.1
N.C. Gen. Stat. §120-85
N.C. 1977 Executive Order No. I
N.D. Cent. Code §16-22-01
Ohio Rev. Code Ann. §102.01 (Page)
Okla. Stat. Tit. 74 §1401
Or. Rev. Stat. §244.010
R.I. Gen. Laws §36-14-1
S.C. Code §8-13-810
S.D. Compiled Laws Ann. §3-1A-1
Tenn. Code Ann. §8-4125
1975 Tenn. Pub. Acts. Ch. No. 313
Tex. Pub. Offices Code Ann. Tit. 110A, §6252-9b (Vernon)
Utah Code Ann. §67-16-1
Va. Code §2.1-352
Wash. Rev. Code §42.17.240
W. Va. Code §6B-1-1
Wis. Stat. §19.41

[20]Federal "Public Officials Integrity Act of Oct. 26, 1978, P.L.No. 95-521, ____ Stat. ___, ___ U.S.C. ___, requires public financial disclosure by members of the Legislative, Executive and Judicial branches. The President and Vice-President, members of congress and candidates to those offices, as well as federal employees paid at the GS-16 level or above, must file an annual financial statement containing, *inter alia:*

> Each source, type and amount of income from any source other than salaries.
> Gifts other than from a relative.
> The identity and category of value of any interest in trade or business property bearing a value of $1,000 or more.
> Debts owed, identifying the creditor, in excess of $5,000. Debts for home mortgages, car loans, household furniture or appliances, are excepted.
> The identity, date and category value of purchases, sales or exchanges of real property (other than personal residence) stocks, bonds or other securities, exceeding $1,000.00 during the preceding year. (Transactions *with* spouse or one's children do not have to be reported.)
>
> The public official must also report the assets, liabilities and financial transactions of his or her spouse and dependent children; except that spouse and dependent children transactions may be omitted if the public official certifies that he or she had no control over the spouse or children's economic activities and would not receive any economic benefit from those interests.
>
> Categories of value for reporting assets, liabilities and property transactions are:
>
> (a) less than $5,000.00. (b) $5,000-15,000. (c) $15,000-50,000. (d) $50,000-100,000. (e) $100,000-$250,000. (f) $250,000-$500,000. (g) $500,000-$1,000,000. (h) $1,000,000-$2,000,000 (i) $2,000,000-$5,000,000. (j) above $5,000,000.

quire incumbents and persons seeking public office to disclose their personal financial interests and economic resources.

In some respects, Florida's Amendment is one of the most intrusively stringent disclosure codes in the nation. It requires the publication of the value of all assets and liabilities in excess of $1,000.00; income from all primary sources in excess of $1,000.00, or the individual's most recent Federal Income Tax return. It requires professional office holders to disclose the names of clients and the amounts of their fees, without regard for the burden that this places on lawyer-client, physician-patient, clergy-parishioner and other relationships where there is a reasonable expectation, even a duty, of third person privacy. Florida allows no exemption for extraordinary strains on these fiduciary relationships nor does it provide procedures for seeking exemption for particular hardships.

On the other hand, Florida's Amendment fails to require either the *recording* or the disclosure of spouse or minor children assets, liabilities, income or transactions; and further fails to require *recording* or disclosure of secondary income except as the Commission shall prescribe "rules (which) shall include disclosure of

secondary sources of income." Art. II, §8(h)(i)b, Fla. Const.[21]

[21]The Court of Appeals stated its concerns about secondary source *disclosures* but noted the existence of an "option".

> The shape of the secondary source requirement is unclear. If precise regulations on this matter have been promulgated by the Florida Commission on Ethics, we have not found them. Commission regulations might allow exemptions in sensitive situations. The Amendment provides an option, the federal tax return, which eliminates any need to itemize income sources. On the record before us, we cannot invalidate this feature of the Amendment. We intimate no opinion as to the outcome of a challenge to the application of the secondary source requirement in some specific situation.
>
> *Plante v. Gonzalez, supra*, 575 F.2d, at 1137.

Paradoxically, the Court of Appeals voiced trepidation about the disclosure of the "option":

> Without implying any views on the merits of a suit which properly raised the issue, we feel a substantial constitutional issue might be raised by disclosure of one's income tax returns. Such disclosure could be troublesome if it were to reveal the nature of various contributions made by the official or candidate, such as contributions to a church, a political party, or a charity. Regulations by the Commission on Ethics might, of course, eliminate any threat of such sensitive revelations. The issue must await another case.
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> *Plante v. Gonzalez, supra*, 575 F.2d, at 1133, n. 20.

The absence of these two factors, prevalent in other state[22] and Federal legislation, makes the Amendment a

[22]The following statutes compel public officials to record the financial interests of members of their immediate family:

Ala. Code Tit. 55, §327(8); Alaska Stat. §39.50.010; Ariz. Rev. Stat. §38-541; Ark. Stat. Ann. §12-3001; Colo. Rev. Stat. §24-6-201; 1977 Conn. Pub. Acts 77-600; Del.1977 Executive Order No. 1; Ill. Ann. Stat. ch. 127, §601-101 (Smith-Hurd); Ill. 1973 Executive Order No. 4; Ill. 1977 Executive Order No. 3; Ind. Code Ann. §4-2-6 (Burns); Ky. Rev. Stat. §61.710; Me. Rev. Stat. Tit. 1, §1001; Md. Ann. Code Art. 33, §29-1; Md. 1969 Executive Order Art. 41; Md. 1974 Executive Order Art. 33; 1978 Mass. Adv. Legis. Serv. Ch. 210; 1978 Mass. Adv. Legis. Serv. Ch. 268B; Neb. Rev. Stat. §49-1101; Nev. Rev. Stat. §528; N.J. 1975 Executive Order No. 15; N.M. Stat. Ann. §5-12-1; N.C. Gen. Stat. §120-85; N.C. 1977 Executive Order No. 1; N.D. Cent. Code §16-22-01; Ohio Rev. Code Ann. §102.01 (Page); Or. Rev. Stat. §244.010; R.I. Gen. Laws §36-14-1; S.D. Compiled Laws Ann. §3-1A-1; Tenn. Code Ann. §8-4125; Tex. Pub. Offices Code Ann. Tit. 110A, §6252-9b (Vernon); Va. Code §2.1-352; W. Va. Code §6B-1-1; Wis. Stat. §19.41

The following statutes require disclosure of secondary sources of income:

Ala. Code Tit. 55, §327(8); Alaska Stat. §39.50.010; Ariz. Rev. Stat. §38-541; Ark. Stat. Ann. §12-3001; Colo. Rev. Stat. §24-6-201; 1977 Conn. Pub. Acts 77-600; Del. 1977 Executive Order No. 1; Fla. Stat. §112.311; Haw. Rev. Stat. §84-1; Ill. Ann. Stat. ch. 127, §601-101 (Smith-Hurd); Ill. 1973 Executive Order No. 4; Ill. 1977 Executive Order No. 3; Ind. Code Ann. §4-2-6 (Burns); Kan. Stat. Ann. §46-215; Ky. Rev. Stat. §61-710; Me. Rev. Stat. Tit. 1, §1001; Md. Ann. Code Art. 33, §29-1; Md. 1969 Executive Order Art. 41; Md. 1974 Executive Order Art. 33; 1978 Mass. Adv. Legis. Serv. Ch. 210; 1978 Mass. Adv.

Legis. Serv. Ch. 268B; Minn. Stat. §10A.01; Neb. Rev. Stat. §49-1101; Nev. Rev. Stat. §528; NJ 1975 Executive Order No. 15; N.M. Stat. Ann. §5-12-1; N.Y. Pub. Off. Law §73; N.Y. 1975 Executive Order. No. 10; N.C. Gen. Stat. §120-85; N.C. 1977 Executive Order No. 1; N.D. Cent. Code §16-22-01; Ohio Rev. Code Ann. §102.21 (Page); Or. Rev. Stat. §244.010; R.I. Gen. Laws §36-14-1; S.D. Compiled Laws Ann. §3-1A-1; Tenn. Code Ann. §8-4125; 1975 Tenn. Pub. Acts. Ch. No. 313; Tex. Pub. Offices Code Ann. Tit. 110A, §6252-9b (Vernon); Utah Code Ann. §67-16-1; Va. Code §2.1-352; Wash. Rev. Code §42.17.240; W. Va. Code §6B-1-1; Wis. Stat. §19.41

Other statutes include provisions which, for example:

(1) Limit public access to the financial data:

1977 Conn.Pub.Acts 77-600 (Although the financial statement is a matter of public information, the names of clients and customers listed as sources of income shall be sealed and confidential. Only upon a finding of probable cause may the Commission turn over to the chief state's attorney such relevant information as may be germane to the specific violations or the prosecutor may subpoena the information in a criminal action. The information is not open to public inspection unless the public official requests otherwise);

Haw.Rev. Stat. §84-1, 84-17; Ind. Code Ann. §4-2-6;

Kan. Stat. Ann. §46-215 (each individual examining a financial statement must sign a form or register prepared and publicly maintained by the secretary of state identifying the date and the examiner by name, occupation, address, and telephone number);

Md. Ann. Code Art. 33, §29-1 (persons examining shall record their name, address and be subject to reasonable fees and regulations);

N.M. Stat. Ann. §5-12-1 (The information on the disclosures, except for the valuations attributed to the reported interests, shall be made available by the secretary of state for inspection to any citizen of this state. The valuation shall be confidential except for official removal or impeachment proceedings.");

N.Y. Exec. Law §74 (Attorney-general may, in his publication of advisory opinions and determinations of the committee, make appropriate deletions to prevent disclosure of the identity of officers and employees involved);

N.Y. Legis. Law §80 (All investigatory evidence shall be sealed and deemed confidential);

(2) Allow petitions for special exemptions to disclosure requirements:

N.Y. 1975 Executive Order No. 10 ("Any person required to file such statements may request the Board to delete an item, which may be deleted by the Board only upon a finding that any such item is of a highly personal nature, does not in any way relate to the duties of the position held by such person, and does not create an actual or potential conflict of interest.");

N.C. 1977 Executive Order No. 1;

(3) Allow reporting of the mere identity of assets or value in terms of categorical range amounts, e.g.

Ala. Code Tit. 55, §327(8); Cal. Gov't Code §87200 (West); Ill. Ann. Stat. ch. 127, §601-101 (Smith-Hurd); Me. Rev. Stat. Tit. 1, §1001; Nev. Rev. Stat. §528, N.C. 1977 Executive Order No. I; Tex. Pub. Offices Code Ann. Tit. 110A, §6252-9b (Vernon);

(4) Specifically exempt the listing of individual clients, customers or patients; e.g.

Nev.Rev. Stat. §528; Ohio Rev.Code. Ann §102.01 (Page).

blunt and totally ineffective instrument for electoral reform in the State of Florida. Even indulging the assumption that public officials will report unauthorized income or conflicting transactions, total avoidance of detection *under law* may be easily accomplished by at least two methods: (a) by taking the private gain in the name of a spouse or minor child, or (b) by creating a professional corporation or other intermediate association from which only a reported *salary* is drawn and reported, but not the nature, name or amount of the secondary source of profit. In *Buckley, supra,* similar loopholes that permitted wholesale skirting of restrictions helped condemn the ceilings on independent expenditures in the context of campaign financing. Laws which could not substantially achieve legitimate governmental ends, while invading protected rights were held to be invalid for both reasons.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify §608(e)(1)'s ceiling on independent expenditures. First, assuming, *arguendo,* that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, *§608(e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers.* Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, §608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as

they want to promote the candidate and his views. *The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole — closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder.* It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. [Cite].

Buckley v. Valeo, supra, 96 S.Ct., at 647, 46 L.Ed.2d, at 702.

The courts of fifteen states have reviewed the laws of their respective jurisdictions.[23] The contextual variations among the statutes and the differing ground for the decisions defy any inventory analysis. It is clear that a two-thirds majority of the fifteen jurisdictions have upheld financial disclosure laws as they pertain to elected

[23]ALABAMA. *Comer v. City of Mobile,* Ala. 1976, 337 So.2d 742.
ALASKA. *Falcon v. Alaska Public Offices Comm'n,* Alaska 1977, 570 P.2d 469.
CALIFORNIA. *City of Carmel-by-the-Sea v. Young,* 1970, 2 Cal.3d 259, 85 Cal. Rptr. 1, 466 P.2d 225; *County of Nevada v. MacMillen,* 1974, 11 Cal.3d 662, 114 Cal. Rptr. 345, 522 P.2d 1345; *Hays v. Wood,* 1978, 78 Cal.Supp.3d 352,144 Cal. Rptr. 456 (Cal.App. 1978).
FLORIDA. Goldtrap v. Askew, Fla. 1976, 334 So.2d 20.
ILLINOIS. *Buettell v. Walker,* 1974, 59 Ill.2d 146, 319 N.E.2d 502; *Illinois State Employee's Ass'n v. Walker,* 1974, 57 Ill.2d 512, 315 N.E.2d 9, cert. den. sub nom., *Troopers Lodge No. 41 v. Walker,* 1974, 419 U.S. 1058, 42 L.Ed.2d 656, 955 S.Ct. 642; *Stein v. Howlett,* 1972, 52 Ill.2d 570, 289 N.E.2d 409, app. dism'd, 1973, 412 U.S. 925, 37 L.Ed.2d 152, 93 S.Ct. 2750.
MARYLAND. *Montgomery County v. Walsh,* 1975, 274 Md. 502, 336 A.2d 97, app. dism'd, 1976, 424 U.S. 901, 96 S.Ct.1091, 47 L.Ed.2d 306.
MASSACHUSETTS. *Opinion of the Justices to the Senate,* Mass. 1978, 376 N.E.2d 810.
MICHIGAN. *Advisory Opinion on Constitutionality of 1975 PA 227* (Questions 2-10), 1976, 396 Mich. 465, 242 N.W.2d 3.
MINNESOTA. *Klaus v. Minnesota State Ethics Commission,* 1976, 309 Minn. 430, 244 N.W.2d 672.
MISSOURI. *Chamberlin v. Missouri Elections Comm'n* Mo. 1976, 540 S.W.2d 876; *Labor's Educ. and Political Club v. Danforth,* Mo. 1978, 561 S.W.2d 339.
NEVADA. *Dunphy v. Sheehan,* Nev. 1976, 549 P.2d 332.
NEW JERSEY. *Lehrhaupt v. Flynn,* Chan. Div. 1974, 129 N.J. Super. 327, 323 A.2d 537, aff'd App. Div. 1976, 140 N.J. Super. 250, 356 A.2d 35; *Kenny v. Byrne,* App. Div. 1976, 144 N.J.Super. 243, 365 A.2d 211.
NEW YORK. *Hunter v. City of New York,* N.Y. Sup.Ct. 1976, 88 Misc.2d 562, 391 N.Y.S.2d 289, aff'd, 1977 58 A.D.2d 136, 396 N.Y.S. 186; *Dwyer v. Kahn,* N.Y. Sup.Ct. 1976, 88 Misc.2d 73, 387 N.Y.S.2d 535; *Evans v. Carey,* 1976, 53 A.D.2d 109, 385 N.Y.S.2d 393, aff'd, 1976, 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983.
WASHINGTON. *Fritz v. Gorton,* 1974, 83 Wash.2d 275, 517 P.2d 911, app. dism'd, 1974, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208.
WISCONSIN. *In re Kading,* 1975, 70 Wis.2d 508, 235 N.W.2d 409.

officials.[24] The courts, however, of Alaska, *(Falcon v. Alaska Public Offices Commission,* 1977, 570 P.2d 469), California, *(City of Carmel-By-the-Sea v. Young,* 1970, 466, P.2d 225), Michigan, *(Advisory Opinion on Constitutionality of 1975 PA 227 [Questions 2-10],* 1976, 396 Mich. 465, 242 N.W.2d 3), Missouri, *(Labor's Educ. and Political Club v. Danforth,* 1978, 561 S.W.2d 339) and Nevada, *(Dunphy v. Sheehan,* 1976, 549 P.2d 332) have refused to sustain their particular State's disclosure laws.[25]

[24]Federal Constitutional right of privacy challenges were addressed and rejected in the following decisions:

California: Hays v. Wood, 1978, 78 Cal.Supp.3d 352, 144 Cal. Rptr. 456.

Illinois: Stein v. Howlett, 1972, 52 Ill.2d 570, 289 N.E.2d 409, app. dism'd, 1973, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152; Illinois State Employee's Ass'n v. Walker, 1974, 57 Ill.2d 512, 315 N.E.2d 9, cert. denied sub.nom., Troopers Lodge No. 41 v. Walker, 1974, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656 (Powell and Blackmun, JJ., would grant cert.)

Maryland: Montgomery County v. Walsh, 1975, 274 Md. 502, 336 A.2d 97, app. dism'd, 1976, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306.

Massachusetts: Opinion of the Justices to the Senate, 1978, 376 N.E.2d 810.

Minnesota: Klaus v. Minnesota State Ethics Comm, 1976, 309 Minn. 430, 244 N.W.2d 672.

New Jersey: Lehrhaupt v. Flynn, 1974, 129 N.J. Super. 327, 323 A.2d 537, aff'd 1976, 140 N.J. Super. 250, 356 A.2d 35; Kenny v. Byrne, 1976, 144 N.J. Super. 243, 365 A.2d 211.

New York: Hunter v. City of New York, 1976, 88 Misc.2d 562, 391 N.Y.S.2d 289, aff'd 1977, 58 A.D.2d 136, 396 N.Y.S. 186; Evans v. Carey, 1976, 53 A.D.2d 109, 385 N.Y.S.2d 393, 359 N.E.2d 983; aff'd, 1976, 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983.

Washington: Fritz v. Gorton, 1974, 83 Wash.2d 275, 517 P.2d 911, app.dism'd, 1974, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208.

[25]The Nevada and Alaska Courts based their determinations on state grounds.

The resulting outfall from these disclosure enactments decomposes for the public officeholder and seeker the fine web of privacy cloaking every other American by constitutional guarantee. Whether this is an effective procedure necessary for the improvement of the electoral process, or whether this is a gross violation of constitutionally protected guarantees of privacy, has not yet been authoritatively determined. Until it is decided, some qualified candidates will shrink from the indignity of unnecessary financial scrutiny.[26] The number is uncertain. Those whose sensibilities prohibit them from financial disclosure will also decline to announce their reasons for not qualifying or retiring. Others will endure the embarrassment and offer themselves for public service. All are entitled to know whether the Hobson's choice imposed upon them by these laws is constitutional or not. Of lesser significance, but still of major importance, is the growing conflict in decisions among the highest courts of the states which have considered the question. That some officials

[26]The Court of Appeals chose to disregard this problem.

Disclosure requirements may deter some people from seeking office. As the Supreme Court has made clear, however, mere deterrence is not sufficient for a successful constitutional attack. Bullock v. Carter, 1972, 405 U.S. at 142-43, 92 S.Ct. 849. Otherwise, official salary levels or the location of the capital city might furnish the basis for a constitutional attack. The key to this issue is who is excluded. These requirements are not unconstitutional unless "they are so restrictive that they deny a cognizable group a meaningful right to representation." Tribe, American Constitutional Law, §13-19 (1978). See also Developments in the Law - Elections, 88 Harv.L.Rev.1111, 1218, 1176–77 (1975).

Plante v. Gonzalez, supra, 575 F.2d, at 1126.

are forced to disclose, while others are not is an anomalous situation which warrants correction.

Where serious questions of Federal constitutional law exist with regard to statutes affecting significant numbers of Americans, particularly those who aspire to or who are in the public service, the court has not hesitated to remove uncertainty and deprivation by granting review.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT A STATE'S INTEREST IN SECURING INTEGRITY IN PUBLIC OFFICE WARRANTS THE ELIMINATION OF THE PUBLIC OFFICIAL'S PRIVACY IN FINANCIAL AFFAIRS.

The District Court viewed constitutional protection of privacy interests very narrowly:

> To date the Supreme Court has extended the fundamental right of privacy only to a narrowly drawn area surrounding family life and the types of highly personal choice intrinsic to the family. "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 65 (1973). Similar language is found in *Paul v. Davis,* 424 U.S. 693, 713 (1976); and *Whalen v. Roe,* ____U.S. at ____, 51 L.Ed.2d at 73 n. 26. Moreover, it could hardly be claimed that the interest in personal financial privacy asserted by the

> plaintiffs here shares the same attributes of those interests the court has deemed "fundamental." "To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition." *Moore v. City of East Cleveland,* ____U.S. at ____, 52 L.Ed.2d at 560 (Stewart, J., dissenting).

District Court Opinion (App. p. 7)

It found that financial privacy is neither "fundamental" (App. p. 7) nor "inherent in the concept of ordered liberty" (App. p. 7) and ruled that the autonomy branch of privacy does not prohibit compulsory economic disclosure. To this extent, the Court of Appeals agreed.

> Financial privacy does not fall within the autonomy right on its own. The essence of that right is "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 599-600, 97 S.Ct. 876. Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process. Their effect on financial decisions is more indirect. They might deter some decisions. *More basically, however, disclosure laws do not involve decisions as important as those in the earlier decided cases.*
>
> Plante, supra, 575 F.2d, at p. 1130-1131 (emphasis supplied).

Financial privacy is not within the autonomy branch of the right to privacy. Disclosure does not directly affect such fundamental decisions that "we are deprived of control over such intimacies of our bodies and minds as to offend what are ultimately shared standards of autonomy." Gerety, Redefining Privacy, 12 Harv. Civ.R.-Civ. L.L.Rev. 233, 268 (1977). Nor is its indirect effect on intimate decisions as strong as some which the Court has held do not invoke strong constitutional protection. The district court properly concluded that the senators cannot bring their complaint within this branch of the right to privacy.

Plante, supra, 575 F.2d, at P. 1132.

However, the Court of Appeals looked to the second category under the rubric of "privacy", that strand

called the right to confidentiality,[27] and therein found protection for the right of economic and financial privacy. In so holding, the Court of appeals relied on *California Bankers Ass'n v. Schultz*, (1974) 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812, wherein recording and disclosure requirements contained in the Bank Security

[27]See Gerety — *Redefining Privacy*, 12 Har.Civ.R.L.Rev.233 (1977)

> In *Whalen v. Roe*, (1977) 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64, the Supreme Court characterized privacy as having "two different kinds of interests". The first, *autonomy*, is "the interest in independence in making certain kinds of important decisions"; the second, "is the individual interest in avoiding disclosure of personal matters." 97 S.Ct., at 876. The first class is apparently still limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" *Paul v. Davis*, (1976) 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405. The second class (avoiding disclosure of personal matters) upon which the Court of Appeals relied to find the privacy interest in financial matters has not been curtailed. In affirming its existence, the Supreme Court stated:
>
> > In his dissent in Olmstead v. United States, Mr. Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men." 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed.944; in Griswold v. Connecticut, the Court said: ". . . the First Amendment has a penumbra where privacy is protected from governmental intrusion." 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510. See also Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542; California Bankers Assn. v. Schultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (Douglas J., dissenting, at 79, 94 S.Ct. at 1526) (Powell, J., concurring, at 78, 94 S.Ct. at 1525).
>
> *Whalen v. Roe*, supra, 97 S.Ct., at 876,n.25.

Act of 1970, 12 U.S.C. §1829(b) *et seq.*, and its implementing regulations were challenged. Title I of the Act required financial institutions to maintain records of the identities of their customers, to microfilm copies of certain checks drawn by them, and to keep records of certain other items. Title II of the Act compelled disclosures of certain foreign and domestic currency transactions. The government's interest was highly visible; the bank records would "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceeding." *Id.*, 39 L.Ed.2d, at 854. Nevertheless, a three Judge court found that the domestic reporting provisions of Title II of the Act were violative of the constitutional rights of the bank's customers:

> The court held that since the domestic reporting provisions of the Act permitted the Secretary of the Treasury to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts, *and since the Act could conceivably be administered in such a manner as to compel disclosure of all details of a customer's financial affairs, the domestic reporting provisions must fall as facially violative of the Fourth Amendment.* (emphasis added)
>
> *Id.*, 39 L.Ed.2d, at 829.

The Supreme Court reversed in a plurality decision, holding that since only reports of abnormally large transactions in currency are required, "[t]he regulations do not impose unreasonable recording requirements on

the banks" *Id.*, 39 L.Ed.2d, at 844. It held that on this basis niether First, Fourth nor Fifth Amendment protections were violated.

The three dissenters (Justices Douglas, Brennan, Marshall) were not satisfied with that rationale in the face of strong privacy claims. Justice Douglas asserted:

> Customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts.
>
> *Id.*, 39 L.Ed.2d, at 852.

Further:

> It is, I submit, sheer nonsense to agree with the Secretary that *all bank records of every citizen* "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." That is unadulterated nonsense unless we are to assume that every citizen is a crook, an assumption I cannot make.
>
> Since the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests, a regulation impounding them and making them automatically available to all federal investigative agencies is a sledgehammer approach to a problem that only a delicate scalpel can manage. Where fundamental personal rights are involved — as is true when as here the Government gets large access to one's

beliefs, ideas, politics, religion, cultural concerns, and the like — the Act should be "narrowly drawn" (Cantwell v. Connecticut, 310 U.S. 296, 307, 84 L.Ed. 1213, 60 S.Ct. 900, 128 ALR 1352) to meet the precise evil. *Bank accounts at times harbor criminal plans. But we only rush with the crowd when we vent on our banks and their customers the devastating and leveling requirements of the present Act. I am not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.* (emphasis added)

Id., 39 L.Ed.2d, at 855.

The dissenters' belief in a limited right of financial privacy was echoed by Justices Powell and Blackmun, who, while concurring with the majority because regulations (31 CFR §103.22) limited domestic reporting requirements to "a transaction in currency of more than $10,000.00" warned:

> A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. *At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.* Moreover, the potential for abuse is

particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. U.S. v. United States District Court, 407 U.S. 297, 316-317, 32 L.Ed.2d 752, 92 S.Ct. 2125 (1972). As the issues are presently framed, however, I am in accord with the Court's disposition of the matter. (Powell, J., concurring) (emphasis added).

Id., 39 L.Ed.2d, at 850-851.[28]

The recognition of a constitutional right to financial privacy was the beginning, not the end, of the Court of Appeal's inquiry. Privacy rights are no more absolute than are other rights secured by the constitution; and

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[28]This view on the existence of a right in financial privacy of an apparent majority of the *California Bankers Association, supra*, court was approved in the *per curiam* opinion in *Buckley, supra*, wherein the court stated:

> Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations for "[f]inancial transactions can reveal much about a person's activities, associations and beliefs." California Bankers Ass'n v. Schultz, 416 U.S. 21, 78–79, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (1974) (Powell, J., concurring).
>
> *Buckley v. Valeo*, supra, 46 L.Ed.2d, at 714, 96 S.Ct., at 657.

are subject to displacement by the demands of sufficiently important state interests. The Court of Appeals found, and the petitioners agree, that Florida had the right to demand recording of personal financial data from incumbents and candidates for public office.

The second stage of reasoning in the Court of Appeals decision involved the Senators' claim that although competing public interests outweigh the individual privacy right, the least intrusive means must be used to achieve those ends. The court rejected the proposition that all government interests are fully met by *recording* of financial data with an independent commission charged with administration of the data pending a probable cause finding of wrongdoing. To the contrary, the court held that public disclosure of personal financial interests advanced one of the most legitimate of state interests, and justified publication of the Senators' financial statements.

The senators' final complaint is that the State's interests would be served just as well by limiting disclosure to the Florida Commission on Ethics. This could deter some corruption, restore some public confidence, and detect some malfeasance. But the Florida voters have decided that it could not provide the voting public with the valuable information public disclosure creates; something more is needed. *This educational feature of the Amendment serves one of the most legitimate of state interests: it improves the electoral process. That goal, recognized as important by the Supreme Court in Buckley, can be met in no other way. That goal justifies public publication of the*

senators' financial statements. (emphasis added).

Plante v. Gonzalez, supra, 575 F.2d, at 1137.

In other words, the Court of Appeals held that where recording of private data can be compelled by the state, public disclosure of the data can be simultaneously compelled without any further showing that vindication of State interests will require that disclosure; or that public disclosure is the method most "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo,* 46 L.Ed.2d, at 691.

In so holding, the Court of Appeals rejected the guidance of two recent decisions which upheld privacy invasions caused by compulsory recording of personal data with governmental officials, precisely because *public disclosure* of the data was prohibited and adequate provision was made to safeguard privacy rights from such disclosure.

In *Nixon v. Administrator of General Services,* (1977) 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867, the court considered the validity of 44 U.S.C. §2107, the "Presidential Recording and Materials Preservation Act", which authorized the Administrator of General Services to take custody of the papers and tape recordings of former President Richard M. Nixon. His duty was to screen the materials, to return those deemed personal and private in nature and retain the remainder for future public access. The Act was challenged on a variety of grounds including a claim that its recording and disclosure requirements violated appellant's

privacy interests. The President acknowledged a diminished right of privacy for those who enter public life; but argued that ". . . he was not thereby stripped of all legal protection for his privacy," *Nixon,* supra, 97 S.Ct., at 2796, a point with which the Supreme Court agreed:

> One element of privacy has been characterized as "the individual interest in avoiding disclosure of personal matters . . ." Whalen v. Roe, [cite omitted]. *We may agree with appellant that, at least when government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening.* 408 F.Supp., at 360. We may assume with the District Court, for the purposes of this case, that this pattern of *de facto* Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials. Katz v. United States, 389 U.S. 347, 351-353, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967).
>
> *Nixon,* supra, 97 S.Ct., at 2797. (emphasis added)

The Court found there to be a compelling need for examination of the 42 million documents, not more than

200,000 of which could possibly embrace the appellant's privacy claim relative to:

> extremely private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files . . .
>
> *Nixon,* supra, 97 S.Ct., at 2798.

But the court found that the examination process would not result in public disclosure, since it would be undertaken by government archivists with an unblemished record for discretion, and on that basis upheld the Constitutionality of the statute:

> In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, see §104(a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will

> further moot appellant's fears that his materials will be reviewed by "a host of persons," Brief for Appellant 150, we are compelled to agree with the District Court that appellant's privacy claim is without merit.

Nixon, supra, 97 S.Ct., at 2801.

The Court made clear that examination, even by discrete archivists was subject to the least restrictive means test; and that since, in this instance, there was no alternative, to such limited, non-public inspection, it upheld the statute:

> It is of course true that involvement in partisan politics is closely protected by the First Amendment, . . . and that "compelled disclosure in itself can seriously infringe on privacy and belief guaranteed by the First Amendment." . . . *But a compelling public need that cannot be met in a less restrictive way will override those interests, . . ., "particularly when the 'free functioning of our national institutions' is involved." . . . Since no less restrictive way than archival screening has been suggested as a means for identification of materials to be returned to appellant, the burden of that screening is presently the measure of his First Amendment claim. . . .* The extent of any such burden, however, is speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted. §§104(a)(5),(a)(7), 105(a). As the District

> Court concluded, the First Amendment claim is clearly outweighed by the important governmental interests promoted by the Act.

Nixon, supra, 97 S.Ct., at 2802-2803.

In *Whalen v. Roe,* (1977) 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64, the Court upheld portions of New York's Controlled Substances Act, which compelled the recording in a centralized computer file, of the names of persons who obtained, pursuant to a physician's prescription, certain drugs for which there was a lawful and an unlawful market. The District Court had enjoined enforcement on the ground that the statute violated the drug users' constitutionally protected right of privacy. On appeal, the Supreme Court applied the two-pronged test above described. It found that there was a compelling state interest in requiring the recording of the medical data in a centralized computer bank.

> There surely was nothing unreasonable in the assumption that the patient identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control. For if an experiment fails — if in this case experience teaches that the patient

identification requirement results in the foolish expenditure of funds to acquire a mountain of useless information — the legislative process remains available to terminate the unwise experiment. It follows that the legislature's enactment of the patient identification requirement was a reasonable exercise of New York's broad police powers.

Whalen v. Roe, supra, 97 S.Ct., at 875-876.

In addition the court found that the statute utilized the least intrusive means so as to constitute the least possible invasion of privacy rights.

No public disclosure of the data was permitted absent specific allegations of overuse of drugs by specific patients.

Public disclosure of patient information can come about in three ways. Health department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist or the patient may voluntarily reveal information on a prescription form.

The third possibility existed under the prior law and is entirely unrelated to the existence of the computerized data bank. Neither of the other two possiblities provides a proper ground for attacking the statute as invalid on its face.

There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly. And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient identification program.

Id., 97 S.Ct., at 877-878.

It is clear that the Supreme Court has warned that the inhibiting features of public disclosure of personal information may be unconstitutional even while approving compulsory recording of the same data. The Court has not yet ruled directly on public disclosure issues in the context of a public official's personal financial data, but has clearly stated that public disclosure as well as recording must meet the test of overwhelming need and the absence of other reasonable alternatives. Neither of the Courts below heeded this standard, or applied the tests to public disclosure as distinguished from recording with independent agencies.

III

THE PETITIONERS HAVE STANDING TO ASSERT THE PRIVACY INTERESTS OF THEIR CLIENTS, CUSTOMERS, BUSINESS ASSOCIATES AND FAMILY MEMBERS.

In lieu of public display of one's federal income tax return, the officeholder or candidate may file a sworn statement identifying each source and amount of income received in excess of $1,000. The Court of Appeals recognized that clients, patients and customers who utilize the non-governmental services of the officeholder, may be entitled to some privacy in their dealings. *Plante,* supra, 575 F.2d, at 1137. Nevertheless the Court of Appeals declined to consider the invasion into the privacy of these third parties, stating:

> No clients or patients are parties to this suit. The Senators have not tried to assert the interest of their clients or customers. The shape of the secondary source requirement is unclear. If precise regulations on this matter have been promulgated by the Florida Commission on Ethics, we have not found them. Commission regulations might allow exemptions in sensitive situations. The Amendment provides an option, the federal tax return, which eliminates any need to itemize income sources. On the record before us, we cannot invalidate this feature of the Amendment. We intimate no opinion as to the outcome of a challenge to the application of the secondary source requirement in some specific situation.

Plante supra, 575 F.2d, at 1137.

Contrary to the Court's characterization, the Senators asserted the privacy interests of third parties and family members in their complaint, stating at paragraph seventeen:

> The requirements of the Amendment are now in effect. The Plaintiff is currently under obligation to comply with disclosure of his assets. Such disclosure in his instance will also result in the shredding of the financial privacy of his parents, his brothers, and his family, who have operated a successful family business enterprise for two generations. Rather than do so, the Plaintiff will resign as State Senator. The Plaintiff aserts that Section 8(a) of the Amendment is null, void and unconstitutional to the extent that it requires public disclosure of financial assets. Until the issue is resolved, the Plaintiff will be in doubt as to his rights.

The invasion of private citizens' privacy, which ineluctably flows from requiring part-time public officers to disclose their financial matters, must be considered. Because only the Senators are directly subjected to the mandatory financial disclosure requirements, they have standing to assert the privacy rights of third parties who are not before the court. Similarly, that citizen who pays dues to an organization or is a member thereof is protected from governmentally forced disclosure to the public-at-large, [*see,* e.g. *Bates v. City of Little Rock,* (1960) 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480] unless and until the government can demonstrate that the means chosen are the least intrusive invasion of individual rights. *Shelton v. Tucker,* (1960) 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231.

In *N.A.A.C.P. v. Alabama ex rel. Patterson,* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, the Association was permitted to assert the rights of its members in order to bar a state court's attempts to compel disclosure of its membership list:

> If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.

Id. at 459.

If the clients, customers and family members have a right of privacy in their financial dealings with public officials — wholly separate from the official's governmental duties — the public disclosure by a Senator of the Senator's financial receipts would "result indirectly in the violation of third parties' rights". *Craig v. Boren* (1976) 429 U.S. 190, 195, 97 S.Ct. 451, 50 L.Ed.2d 397. In *Craig v. Boren,* this Court permitted a beer vendor to raise the equal protection claims of her male customers, who were forbidden to purchase the coveted intoxicant until attaining age 21 while females could legally imbibe at age 18. The Court deemed it decisive that the challenged law placed the vendor under a duty to comply with a statute which would indirectly violate the male customer's rights.

Standing to assert privacy claims of third parties has been regularly extended to those directly regulated by the government. *See, e.g., Griswold v. Connecticut,* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, [Physician and Director of Planned Parenthood Clinic could successfully assert the right of married persons, with whom they had a professional relationship, to boudoir privacy]; *Pierce v. Society of Sisters* (1925) 268

U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. [Private school could assert rights of customer-parents to educate their children in non-public schools]; *Planned Parenthood of Central Missouri v. Danforth,* (1976) 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, [Physicians had standing to assert disclosural privacy claims of patients who had obtained an abortion].

If a citizen chooses to utilize the lawyering talents of Senator Barron, a public figure, that citizen is not thereby transformed into a public figure. *See, Time, Inc. v. Firestone,* (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154. The rights of non-public persons are affected by Article II, §8 and should be weighed in the balance.

CONCLUSION

This court has settled the constitutional issues raised by legislation directed toward the regulation of *campaign financing. Buckley v. Valeo,* (1976) 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659. The unfinished task remains to consider the validity of the laws requiring aspirant and incumbent public officials to *publicly disclose personal financial matters.* The Court of Appeals did not follow this Court's two-pronged test in weighing the competing interests of society's need to preserve the integrity of public office and the individual's personal liberty rights guaranteed by the Constitution. While Art. II, §8, of the Florida Constitution may satisfy legitimate societal interests, its public disclosure requirements *unnecessarily and excessively* violate the individual's privacy rights protected by the First, Ninth and Fourteenth Amendments. Alternative methods are available to serve societal needs with a less drastic intru-

sion into guaranteed rights. The Supreme Court should grant this petition for certiorari in order to satisfy the urgent need for authoritative determination of whether unlimited public disclosure of financial matters, as a precondition to holding public office, unnecessarily violates the individual's right to privacy.

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By_____
TOBIAS SIMON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was this___day of November, 1978, served upon the following persons: Larry Gonzalez, Esq., Executive Director, Florida Commission on Ethics, P.O. Box 6, Tallahassee, Florida 32302; Jesse McCrary, Secretary of State of Florida, The Capitol, Tallahassee, Florida; Reubin O'D Askew, Governor, The Capitol Building, Tallahassee, Florida; Robert L. Shevin, Esq, Attorney General, The Capitol, Tallahassee, Florida.

_____
TOBIAS SIMON

in the

Supreme Court

of the

United States

October Term, 1978

NO. 78- 844

KENNETH A. PLANTE, DEMPSEY J. BARRON, PHILIP D. LEWIS, JACK D. GORDON, and JON C. THOMAS,

Petitioners,

vs.

LARRY GONZALEZ as Executive Director of the Florida Commission on Ethics; BRUCE SMATHERS, as Secretary of State of Florida; THE FLORIDA COMMISSION ON ETHICS: and REUBIN O'D ASKEW, as Governor of the State of Florida,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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INDEX TO APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

TCA 77-0852

KENNETH A. PLANTE, et al.,
Plaintiffs,

vs.

LARRY GONZALEZ, et al.,
Defendants.

TCA 77-0868

JON C. THOMAS,
Plaintiff,

vs.

LARRY GONZALEZ, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

The plaintiffs in these consolidated cases seek a declaratory judgment that the financial disclosure requirement imposed upon elected state and county officers by Article II, §8 of the Constitution of the State of Florida contravenes personal privacy rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 42 USC §1983 and 28 USC

§1343. All the plaintiffs in both lawsuits are members of the Florida State Senate. The defendants are the Florida Commission on Ethics, the Executive Director of the Commission, and the Governor and Secretary of State of the State of Florida.

Presently before the court are the defendants' motions to dismiss for failure to state a claim upon which relief can be granted. A hearing on this motion was held on September 9, 1977. After careful consideration of the arguments made by counsel and the relevant precedents, it is the opinion of this court that the plaintiffs cannot prevail under any state of facts which could be proved in support of their claim. Cook & Nichol, Inc. v. Plimsoll Club, 451 F. 2d 505 (5th Cir. 1971). Accordingly, the motion to dismiss should be granted.

Article II, §8 of the Florida Constitution, popularly known as the "Sunshine Amendment," was placed on the November, 1976, general election ballot by popular initiative and was adopted by a 4-1 vote of the Florida electorate. The portions of the Amendment that are pertinent to the present litigation provide as follows:

> A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (a) All elected and constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.

> (b) Schedule — On the effective date of this amendment and until changed by law:
>
> (1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
>
> a. A copy of the person's most recent federal income tax return; or
>
> b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.
>
> (2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsection (h) (l).

It is not the plaintiffs' contention that compelled disclosure of a public officer's personal finances constitutes a per se violation of a constitutionally based right of privacy. Rather, they argue that the Amendment's disclosure requirements sweep unnecessarily broadly, placing an unwarranted and unreasonable burden upon what they portray as a fundamental right to privacy in personal financial affairs.

See NAACP v. Alabama, 377 U.S. 288 (1964). The general rule is that a fundamental constitutional right may be intruded upon by a state only in furtherance of a legitimate and compeling state interest, Shapiro v. Thompson, 394 U.S. 618 (1968), and that the means used to achieve that legitimate governmental purpose must be no broader nor more limiting of personal liberties than is necessary to attain the goal sought, Shelton v. Tucker, 364 U.S. 479 (1960).

Reasoning from the cases cited in the preceding paragraph and similar decisions, the plaintiffs conclude the method chosen by the people of the State of Florida for insuring the honesty of their representatives in state and county government simply goes too far. Other, less drastic means than those used in Article II, §8 of the Florida Constitution, it is claimed, would be as effective in serving the same purposes. Specifically, the plaintiffs urge that there is no necessity for public officials to be required to disclose the sources of their personal income, the amount of income received from each source, and the dollar value of personal assets. They argue that revelation of sources of income will drive away the clients and customers who utilize the private businesses and services of public officers; listing of specific dollar amounts will serve only to titillate the idly curious. The plaintiffs further suggest that the public interest in preventing corruption or conflict of interest may adequately be satisified by the adoption of alternative methods of disclosure that would be less intrusive upon their privacy, among which would be a procedure requiring only that financial disclosure forms be submitted to an independent commisssion that would hold them in

strict confidence unless and until charges of wrongdoing are brought against a public officeholder.[1]

The basic flaw in the plaintiffs' "less drastic means" analysis is that it assumes there is a fundamental right of privacy inherent in the personal financial affairs of public officers. This is an expansive view of the constitutional privacy right that is unsupported by recent Supreme Court decisions. It is true that the Supreme Court has on several occasions recognized the existence of a protected "zone of privacy" which the state has little or no prerogative to invade. See Roe v. Wade, 410 U. S. 113 (1973); Griswold v. Connecticut, 381 U. S. 479 (1965). Despite earlier doctrinal disagreement as to the constitutional source of this guarantee of personal privacy, Griswold, supra, it is now manifest that it is a "liberty" safeguarded by the Due Process Clause of the Fourteenth Amendment.[2] As the court noted in Whalen v. Roe,____ U. S.____, 51 L. Ed. 2d 64 (1977), the cases involving "privacy" have involved at least two distinct types of interests. "One is the in-

[1]In addition, the plaintiffs profess that their constitutional objections would be obviated by a less burdensome financial disclosure requirement similar to that contained in Florida Statutes §112.3145, the statutory precursor to Article II, §8 of the Florida Constitution. The statute does not necessitate the detailing of asset values, income amounts or the sources of income.

[2]This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. at 153 (emphasis added).

dividual interest in avoiding disclosure of personal matters [which is the interest asserted by the plaintiffs in the case at bar] and another is the interest in independence in making certain kinds of important decisions." ____U. S. at____, 51 L. Ed. 2d at 73 (footnotes omitted).

While the Supreme Court has acknowledged that great deference is to be paid to certain personal privacy values, it has cautioned that the substantive reach of the Fourteenth Amendment in the realm of personal privacy is not to be given a broad scope, but rather a carefully circumscribed one.[3] Only those "personal rights that can be deemed 'fundamental' or implicit in the concept of ordered liberty,' " are to be included within the "guarantee of personal privacy." Roe v. Wade, supra, at 152, quoting Palko v. Connecticut, 302 U. S. 319 (1937). Formulated differently, the Constitution protects those privacy values that are "deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, ____U.S. ____, 52 L. Ed. 2d 531, 540 (1977).

[3]As Mr. Jusitce Powell stated for the plurality in Moore v. City of East Cleveland, ____U.S. at ____, 52 L.Ed.2d at 539:

> Substantive due process has at times been a treacherous field for this Court. These are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.
>
> (Footnote omitted).

To date the Supreme Court has extended the fundamental right of privacy only to a narrowly drawn area surrounding family life and the types of highly personal choice intrinsic to the family. "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." Paris Adult Theatre I v. Slaton, 413 U. S. 49, 65 (1973). Similar language is found in Paul v. Davis, 424 U. S. 693, 713 (1976); and Whalen v. Roe, ____U. S. at ____, 51 L. Ed. 2d at 73 n. 26. Moreover, it could hardly be claimed that the interest in personal financial privacy asserted by the plaintiffs here shares the same attributes of those interests the court has deemed "fundamental." " To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition." Moore v. City of East Cleveland, ____U. S. at ____, 52 L. Ed. 2d at 560 (Stewart, J., dissenting). Neither can it be said that financial privacy is so "inherent in the concept of ordered liberty" that its invasion by the state would thwart basic notions of justice, Palko v. Connecticut, supra, or that it is so "deeply rooted in this Nation's history and tradition" as to warrant inclusion in the roster of fundamental constitutional rights, Moore v. City of Cleveland, supra. The secrecy of one's personal assets and business transactions has never been granted the freedom from government scrutiny traditionally accorded the "sanctity of the family", Moore v. City of East Cleveland, ____U. S. at ____, 52 L. Ed. 2d at 540, as is demonstrated by the long-standing financial disclosure requirements imposed by welfare, social security, tax, and securities regulation laws.[4]

[4]See Note, Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws, 73 Mich. L. Rev. 758 (1975).

The conclusion that personal financial interests do not rise to the constitutional level of those values of privacy and liberty considered fundamental does not, of course, close the inquiry in the present case. It is still necessary to determine the proper standard of review to be applied and to analyze this case in light of that standard. Whalen v. Roe, supra, and Kelley v. Johnson, 425 U.S. 238 (1976), suggest that the appropriate test in a case involving a non-fundamental privacy interest is the rational basis test traditionally applied where economic and social legislation is challenged as unconstitutional, that is, whether the regulation bears a rational relationship to the achievement of a legitimate state interest. On the other hand, Nixon v. Administrator of General Services,____U.S.____, 53 L. Ed. 2d 867 (1977), which is closer factually to the case at hand than are Whalen and Kelley, implies the necessity of a "balancing test", by which the relative merits of the public interest in disclosure are weighed against the private interest in non-disclosure. Cf. Buckley v. Valeo, 424 U.S. 1 (1976).

Judged by a standard of rationality, Article II, §8 of the Florida Constitution is undeniably constitutional. It constitutes a reasoned effort to deal with the problems posed by governmental corruption and the loss of public confidence in the integrity of elected and appointed state officials. Although the plaintiffs contend the Amendment goes farther than is necessary to serve these interests and includes provisions that have little relation to the end sought, it is not the constitutional province of the federal judiciary to question the necessity or wisdom of a state legislative or constitutional enactment. Olsen v. Nebraska ex rel Western Reference and Bond Ass'n., 313 U.S. 236 (1941). This federal court's inquiry ends

with the determination that the provision challenged is not arbitrary, but serves the intended purpose in a rational manner. This court is unable to say that Article II, §8 of the Florida Constitution is not "manifestly the product of an orderly and rational legislative decision." Whalen v. Roe,____U.S. at____, 51 L. Ed. 2d at 72.

Even when measured according to the more exacting "balancing test", the Amendment must still be regarded as constitutional. In Nixon, supra, the Supreme Court was confronted with the former President's claim that the screening of presidential documents for the purpose of separating Mr. Nixon's personal papers from those documents that belonged to the government violated his right to privacy. The Court held that Mr. Nixon had "a legitimate expectation of privacy in his personal communications."____U.S. at____, 53 L. Ed. 2d at 905. Nevertheless. his expectation of privacy was necessarily limited by the fact that "when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight."____U.S. at____, 53 L. Ed. 2d at 900, citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Carefully weighing the merits of the asserted privacy interest "against the public interest in subjecting the presidential materials of appellant's administration to archival screening," the Court found the statutory screening procedure to be constitutional. Among the factors dictating this conclusion were "appellant's status as a public figure, . . . his lack of any expectation of privacy in the overwhelming majority of the materials, [and] the important public interest in preservation of the materials . . ."____U.S.____, 53 L. Ed. 2d at 905.

Buckley v. Valeo, 424 U.S. 1 (1976), also provides guidance as to the facotrs to be considered in a case of this nature. In Buckley, the Supreme Court confirmed the constitutionality of certain provisions of the Federal Election Campaign Act of 1971 that required political committes to keep records of the name and address of each person making a political contribution in in excess of $10 and the amount of the contribution given. If contributions from any one person totalled more than $100, the statute required that the donor's occupation and principal place of business also be recorded. This information was to be reported to the Federal Election Commission, and made available by the commission to the public. These provisions were assailed on the ground that they intruded upon the fundamental privacy of association and belief guaranteed by the First Amendment. The Supreme court applied the strict test of "exacting scrutiny" traditionally utilized when legislation is found to limit the exercise of First Amendment and other fundamental rights. Nevertheless, it was held that the governmental interests involved were "sufficiently important to outweigh the possibility of infringement." Three such governmental interests served by the requirement of public disclosure were identified: (1) "providing the electorate with information 'as to where political campaign money comes from and how it is spent by the candiate' in order to aid the voters in evaluating those who seek federal office"; (2) deterrence of corruption and avoidance of "the appearance of corruption"; and (3) detection of campaign law violations. 424 U. S. at 66-68 (footnote omitted), quoting HR Rep. No. 92-564, p 4 (1971).

The Nixon and Buckley decisions provide controlling precedent for the case at bar. As in Nixon, the

plaintiffs here possess a substantial and legitimate interest in maintaining the privacy of their personal financial affairs. The same countervailing governmental considerations that weighed in favor of disclosure in Nixon and Buckley, however, are also evident in this case. Like Mr. Nixon, the plaintiffs, are public officials who have chosen to divest themselves of a certain degree of the privacy that ordinarily attaches to persons who have not injected themselves into the public spotlight. Moreover, by arguing that a more narrow disclosure requirement would eliminate their constitutional objections, the plaintiffs concede that they do not have a reasonable expectation of privacy in a substantial portion of the information that the Sunshine Amendment requires to be disclosed.

In addition, the Amendment can serve a panoply of important state interests that are nearly identical to those catalogued in Buckley. First, it could safeguard and further what could be termed the voting public's "right to know."[5] It achieves this purpose by giving the electorate detailed information relating to each public official's financial interests and property holdings. Such knowledge "alert[s] the voter to the interests to which a [public officer] is most likely to be responsive." Buckley, 424 U.S. at 67. Second, the Amendment could act as a valuable deterrent to political corruption and conflicts of interest. It may be true, as the plaintiffs insist, that no dishonest public officeholder will voluntarily reveal the receipt of unauthorized funds; however, it is undeniable that the disclosure requirement will tend to

[5][I]nformed public opinion is the most potent of all restraints upon mis-government." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

discourage those who might otherwise use public office as a means toward improperly enriching themselves, and that it will make corrupt practices even more risky than was previously the case. Third, the Amendment may help to create an atmosphere of trust and confidence between the citizens of the State of Florida and the persons they choose to represent them in government. The disclosure requirement accomplishes this end by seeking to banish the appearance of dishonesty and fostering an awareness on the part of state and county officers of their public duty to govern themselves according to a high ethical standard. See Buckley, supra, at 67: United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 565 (1973). Fourth, disclosure of personal assets and finances assists in the detection and investigation of violations of the law and the disciplining and prosecution of lawbreaking government officials.

While this court cannot say that Article II, §8 of the Florida Constitution necessarily constitutes the most perfect means of achieving a diminution in political corruption or that it is the wisest choice of means to accomplish that purpose, the vital state interests outlined above are surely ample enough to outweigh the plaintiffs' expectations of financial privacy and to sustain the constitutionality of the Amendment. The Supreme Court of Florida has held, in a case involving a statutory disclosure provision, that, "The State of Florida has a compelling interest in protecting its citizens from abuse of the trust placed in their elected officials. . ." Goldtrap v. Askew, 334 So.2d 20, 22 (Fla. 1976). Although Goldtrap's characterization of the state's interest as "compelling" is not binding on the federal courts, it does illustrate the great concern of the State of

Florida in guaranteeing the honesty of its public officials — a concern this court may properly recognize and should not lightly ignore.

Finally, there is one additional consideration that makes dismissal proper at this stage. Appeals of state court decisions upholding the constitutionality of financial disclosure laws against the contention that they impermissibly infringed upon privacy rights have on three separate occasions been dismissed by the United States Supreme Court for lack of a substantial federal question.[6] "According to Hicks v. Miranda, 422 U.S. 332 (1975), a vote to dismiss for want of a substantial federal question is a vote on the merits of a case. When the Supreme Court has " 'branded a question as insubstantial, it remains so except when doctrinal developments indicate otherwise' " or until the Supreme Court instructs the lower courts to the contrary. Hicks, supra, at 344, quoting Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259, 263 n. 3 (2d Cir. 1967). The dismissals by the Supreme Court of appeals challenging other financial disclosure laws are not decisive as to the issues raised in the instant case, of course, since the provisions of the statutes involved differed from those found in Article II, §8 of the Florida Constitution. Hicks, supra, at 344, n. 14. The summary disposition given those cases on their merits by the United States Supreme Court, however, reveals the lack of substance in the arguments pressed upon this court by the plaintiffs.

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[6]Stein v. Howlett, 289 N.E.2d 409 (Ill. 1972), appeal dismissed, 412 U.S. 925 (1973); Walsh v. Montgomery County, 336 A.2d 97 (Md. 1975), appeal dismissed, 424 U.S. 901 (1976); Fritz v. Gorton, 517 P.2d 911 (Wash. 1974), appeal dismissed, 417 U.S. 902 (1974).

ORDER

It appearing to a certainty that the plaintiffs cannot prevail under any state of facts which could be proved in support of their claim, it is

ORDERED that the defendants' motions to dismiss are granted, and the plaintiffs' complaints in support of a declaratory judgment are hereby dismissed with prejudice.

DONE AND ORDERED this 14th day of September, 1977.

/s/ WILLIAM STAFFORD
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

Kenneth A. PLANTE et al.,
Plaintiffs-Appellants,

v.

Larry GONZALEZ, etc., et al.,
Defendants-Appellees.

Jon C. THOMAS, Plaintiff-Appellant,

v.

Larry GONZALEZ, etc., et al.,
Defendants-Appellees.

No. 77-3109.

United States Court of Appeals,
Fifth Circuit.

June 30, 1978.

Rehearing and Rehearing En Banc
Denied Aug. 31, 1978.

* * *

Appeals from the United States District Court for the Northern District of Florida.

Before WISDOM, GODBOLD, and CLARK, Circuit Judges.

WISDOM, Circuit Judge:

"[W]ith the decline of religion the law has moved to take over the preventive as well as the punishing function. A man must not only avoid the act that the crowd considers criminal; he must avoid the opportunity, or even the appearance of the opportunity to commit such an act. Without a conscience it is only logical to assume that he will succumb to temptation. Society, therefore, now tries to legislate an end to temptation. . . . The wrong is to be found not in the subjective intent of a fiduciary to betray his trust; such intent will be deduced from the mere existence of a factual situation that in the average man might create temptation."[1]

In 1976 the voters of Florida approved the "Sunshine Amendment" to the state constitution requiring that certain elected officials make public detailed information about their personal finances. Five state senators sued the officials charged with administering the financial disclosure provisions of the amendment.[2] They argued that this exercise of the public's "right to know" violated their constitutional right "not to be known". The district court upheld the disclosure requirements. We affirm.

[1]Auchincloss, When Interests Conflict, N. Y. Times, May 22, 1978.

[2]The senators are Kenneth A. Plante, Dempsey J. Barron, Philip D. Lewis, William Gorman, Jack D. Gordon, and Jon C. Thomas. The defendants are the Executive Director of the Ethics Commission, the Florida Secretary of State, the Governor, and the Commission on Ethics.

I.

Florida entered the 1970's with a relatively weak statute forbidding public officials from acting in conflict of interest. 1967 Fla.Laws 469 (replacement codified at Fla.Stat.Ann. §112.311, *et seq.* (West 1978 Supp.)). The statute covered officers and employees of state agencies, counties, cities, and other political subdivisions, as well as legislators and legislative employees. 1967 Fla.Laws 469, §3. The Act set standards of conduct. Violations were grounds for removal from office or employment, as well as misdemeanors, 1967 Fla.Laws 469, §7. No administrative body regulated official ethics, and the Act required no financial disclosure.

Political scandals rocked Florida in the seventies.[3] One result was a new law governing conflicts of interest. The 1974 statute made numerous changes in the previous law. The most important, for our purposes, was that for the first time, certain officials and employees were required to file statements of their financial interests. Fla.Stat.Ann. §112.3145 (West Supp.1978). The

[3]Florida's Controller, Treasurer, and Superintendent of Education were indicted for selling their influence. A legislative committee recommended that one state supreme court justice be impeached for similar activities. A second justice resigned under fire. A third supreme court justice was reprimanded by the state body supervising judicial conduct. N. Y. Times, April 27, 1975, at 35, col. 1. In 1976 U.S. Representative Robert L. F. Sikes was reprimanded by the House of Representatives because as Chairman of the House Appropriations subcommittee on military construction he had helped pass legislation and secured government decisions from which he benefitted financially. United States Senator Edward Gurney was acquitted of federal charges stemming from alleged influence peddling. N. Y. Times, July 12, 1974, at 10, col. 1; October 28, 1976, at 19, col. 1.

statute also created an administrative body to oversee compliance, the Commission on Ethics. Fla.Stat.Ann. §112.320 (West Supp.1978). Local officers, state officers, and "specified employees", all terms carefully defined in the Act, were covered by the disclosure requirement, as were candidates for state or local elective office. The Act required disclosure of five categories of personal financial information:[4] (1) all sources of income exceeding five percent of gross income for the period covered; (2) all sources of income to a business entity exceeding ten percent of its gross income, *if* the official received an amount from the business entity which was both more than ten percent of the official's gross income and more than $1500; (3) the location and description of all Florida real estate excluding residences and vacation homes, in which the official had more than a five percent interest, and a general description of any intangible personal property worth more than ten percent of the official's total assets; (4) the source of any gifts in excess of $100, except gifts from family members or gifts received through bequest or devise; and (5) every debt greater than the official's net worth. Fla.Stat.Ann. §112.3145 (West Supp.1978). In no case was the official required to disclose a specific dollar amount. The disclosures were to be listed in descending order of magnitude. The statements were to be filed either with the Secretary of State, by state officials and specified employees, or with a local judge, by local officials. Such statements were "public records". Fla.Stat.Ann. §112.3146. The full text of the relevant subsection is set out in Appendix A.

[4]The law also requires quarterly disclosure of the names of any clients represented by an official or employee for a fee or commission before governmental agencies.

This legislation, even as amended in 1975, 1975 Fla.Laws 196, did not satisfy the public's appetite for stricter controls on conflicts of interest. The Florida Constitution may be amended by popular initiative. Fla.Const. art. XI, §3. A successful drive for signatures to a petition put the "Sunshine Amendment" on the Florida ballot in 1976. The initiative passed: 1,765,626 in favor, 461,940 opposed.

The amendment, now Article II, §8 of the Florida Constitution, covers several aspects of conflicts of interest. *See* Appendix B. The part particularly germane to this appeal is subsection (h)(1):

> "Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:
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> a. A copy of the person's most recent federal income tax return; or
>
> b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f) [the statutorily created Commission on Ethics], and such rules shall include disclosure of secondary sources of income."

Fla.Const. art. II, §8(h)(l). The constitutional amendment applies to elected constitutional officials, candidates for such offices, and any other "public officers, candidates, and employees" as determined by law. Fla.Const. art. II, §8(a).[5]

The Florida Commission on Ethics set August 1, 1977, as the deadline for the first filing under the amendment. On July 10, 1977, this suit was filed. The senators sought a declaration that the amendment violated rights guaranteed them by the ninth and fourteenth amendments to the United States Constitution. The senators alleged that they had complied with the statutory disclosure requirements, but would resign rather than comply with the demands of the Sunshine Amendment.

On July 29, 1977, the district court denied the senators' application for a preliminary injunction for failure to show a substantial chance of success on the merits. The defendants moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. After a hearing on September 9, 1977, the court granted the motion.

The court held that the senators' contentions foundered, because the rights they asserted were not "fundamental" constitutional rights: The right to privacy extends only to intimate decisions, usually connected with the family; any right to financial privacy does not rise to constitutional significance. The court found that the Amendment is constitutional when subjected to a balancing test, possibly required by *Nixon v. Administrator of General Services*, 1977, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867. Finding no legal protection for the senators, the court dismissed their complaint. Their appeal, expedited by this Court, followed.[6]

The senators raise two substantial constitutional questions.[7] First, they argue that the public disclosure of their personal financial affairs violates their federally protected right to privacy, derived from the shadows of the Bill of Rights and made applicable to Florida through the fourteenth amendment. Second, they argue that the disclosure scheme unconstitutionally burdens candidates for office, thus depriving voters of their right to vote for candidates of their choice. While many state courts have ruled on the constitutionality of similar plans, this appears to be a case of first impression for the

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[5]A law extending the disclosure provisions of the Amendment to municipal officers, appointed officials, and other public officers and employees was passed by the legislature in 1977 but vetoed by the governor. Appellants' brief at 3, n. 3. The "persons holding statewide elective office" referred to in §8(h)(2), not covered by §8(a), appear to include only the members of the Florida Public Service Commission. Brief of Common Cause, amicus, at 2.

[6]Three amicus briefs were filed. The American Civil Liberties Union filed a brief on behalf of the senators; the Florida League of Women Voters and Common Cause filed briefs on behalf of the State.

[7]The senators also argue that the statute has no rational relationship to any legitimate state ends. Appellants' brief, 10-14. Our analysis of the other constitutional challenges uses a standard of review more strict than this argument utilizes. Our conclusion on thos contentions, therefore, controls our conclusions on this one.

lower federal bench.[8] We will deal with the second, less difficult, issue first.

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[8]Many state courts have ruled on similar plans.

ALABAMA. *Comer v. City of Mobile,* Ala. 1976, 337 So.2d 742, with no privacy argument, upheld except in breadth of application.
ALASKA. *Falcon v. Alaska Public Offices Comm'n,* Alaska 1977, 570 P.2d 469, enjoined disclosure of doctor-official's patients until narrowing regulations are implemented because of the patient's right to privacy.
CALIFORNIA. *City of Carmel-by-the-Sea v. Young,* 1970, 2 Cal. 3d 259, 85 Cal Rptr. 1, 466 P.2d 225, struck down an Act which required disclosure by all officials of all interests on federal privacy grounds. *County of Nevada v. MacMillen,* 1974, 11 Cal.3d 662, 114 Cal.Rptr. 345, 522 P.2d 1345, upheld a narrower replacement statute.
FLORIDA. *Goldtrap v. Askew,* Fla.1976, 334 So.2d 20, upheld Florida's statutory disclosure requirement.
ILLINOIS. *Buettell v. Walker,* 1974, 59 Ill.2d 146, 319 N.E.2d 502, upheld an executive order requiring disclosure of political contributions by some parties against a privacy claim, but found that it exceeded the governor's authority. *Illinois State Employee's Ass'n v. Walker,* 1974 57 Ill.2d 512, 315 N.E.2d 9, *cert. denied sub nom. Troopers Lodge No. 41 v. Walker,* 1974, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656 (Powell and Blackmun, JJ., would have granted certiorari), upheld against state and federal privacy arguments an executive order requiring certain employees to make disclosures, including dollar amounts. *Stein v. Howlett,* 1972, 52 Ill.2d 570, 289 N.E.2d 409, *app. dism'd,* 1973, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152, upheld a statute requiring state officeholders to make financial disclosure.
MARYLAND. *Montgomery County v. Walsh,* 1975, 274 Md. 502, 336 A.2d 97, *app. dism'd* 1976, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306, upheld disclosure against a federal privacy argument, finding no fundamental right of financial privacy and holding that even if such a right existed, the state's compelling interest justified the statute and county ordinance involved.
MICHIGAN. Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 1976, 396 Mich. 465, 242 N.W.2d 3, held that

similar treatment of high officials and local employees was invalid and that the state interest did not justify the disclosures required of the employees.
MINNESOTA. *Klaus v. Minnesota State Ethics Commission.* 1976, 309 Minn. 430, 244 N.W.2d 672, upheld a disclosure law which did not require dollar amounts against privacy attack, with dicta concerning the privileged status of net worth and amount of income.
MISSOURI. *Chamberlin v. Missouri Elections Comm'n,* Mo. 1976, 540 S.W.2d 876, sustained a disclosure law requiring attorneys to identify the sources of their income over attorney-client privilege and overbreadth objections.
NEVADA. *Dunphy v. Sheehan,* Nev. 1976, 549 P.2d 332, declared a disclosure law unconstitutional on vagueness grounds, with dicta opposing the use of dollar values.
NEW JERSEY. *Lehrhaupt v. Flynn,* Chan.Div. 1974, 129 N.J. Super. 327, 323 A.2d 537, *aff'd,* App. Div. 1976, 140 N.J.Super. 250, 356 A.2d 35, upheld a town disclosure ordinance against a privacy attack, finding that invasion of a fundamental right, if any, was justified by the town's interest. *Kenny V. Byrne,* App.Div. 1976, 144 N.J.Super. 243, 365 A.2d 211, upheld an executive order requiring disclosure by certain appointed officials against a privacy challenge while applying the rational relationship test.
NEW YORK. *Hunter v. City of New York,* N.Y. Sup.Ct. 1976, 88 Misc.2d 562, 391 N.Y.S.2d 389, *aff'd,* 1977, 58 A.D.2d 136, 396 N.Y.S. 186, upheld a New York City law requiring disclosure after interpreting it to allow public disclosure only after employees had an opportunity for a hearing on any specific privacy claims. *Dwyer v. Kahn,* N.Y.Sup.Ct.1976, 88 Misc.2d 73, 387 N.Y.S.2d 535, upheld Public Service Commission disclosure and divestiture rules against privacy challenge. *Evans v. Carey,* 1976, 53 A.D.2d 109, 385 N.Y.S.2d 965, *aff'd,* 1976, 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983, upheld an executive order requiring disclosure by employees and officials which included a provision for deleting extremely personal matters.
WASHINGTON. *Fritz v. Gorton,* 1974, 83 Wash.2d 275, 517 P.2d 911, *app. dism'd,* 1974, 417 U.S. 902, 94 S.Ct, 2596, 41 L.Ed.2d 208 upheld against privacy challenges a detailed disclosure law which required disclosure of value ranges rather than dollar figures.

Before we turn to the merits of the case, one question demands attention. The Supreme Court has acted on four cases from state supreme courts involving similar plans. *Montgomery Co. v. Walsh,* 1975, 274 Md. 502, 336 A.2d 97, *app. dism'd,* 1976, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306; *Illinois State Employees Assn'n v. Walker,* 1974, 57 Ill.2d 512, 315 N.E.2d 9, *cert. denied, sub nom. Troopers Lodge No. 41 v. Walker,* 1974, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656; *Fritz v. Gorton,* 1974, 83 Wash.2d 275, 517 P.2d 911, *app. dism'd,* 1974, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208; *Stein v. Howlett,* 1972, 52 Ill.2d 570, 289 N.E.2d 409, *app. dism'd,* 1973, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152. Denial of a petition for certiorari, of course, carries no precedential weight. *See Maryland v. Baltimore Radio Show,* 1950, 338 U.S. 912, 917-19, 70 S.Ct. 252, 254-55, 94 L.Ed. 562, 565-66 (Justice Frankfurter, separate opinion). The dismissal of an ap-

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WISCONSIN. *In re Kading,* 1975, 70 Wis.2d 508, 235 N.W.2d 409, upheld a Court rule requiring financial disclosure without dollar values by judges against a privacy challenge.

We have discovered only one federal case dealing with a similar issue. In *O'Brien v. DiGrazia,* 1 Cir. 1976, 544 F.2d 543, *cert. denied sub nom., O'Brien v. Jordan,* 1977, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223, the First Circuit upheld an order by the Boston police commissioner which required certain police officers to disclose their families' income sources, assets, rough expenditures, and copies of their state and federal tax returns. This information was to be held in confidence by the Commissioner's office. The patrolmen had been linked with organized crime. The Court was not convinced that a right to financial privacy existed. "Privacy in the sense of freedom to withold personal financial information from the government or the public has received little constitutional protection." 544 F.2d at 545-46. The Court then assumed that some right exists, balanced the interests involved, and affirmed the lower court's Rule 12(b)(6) dismissal of the complaint.

peal or a summary affirmance, on the other hand, is a disposition on the merits. The Supreme Court advised lower courts in *Hicks v. Miranda,* 1975, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223, to follow

> "the Second Circuit's advice . . . in *Port Authority Bondholders Protective Committee v. Port of New York Authority,* 387 F.2d 259, 263, n.3 (1967), that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise' . . . ."

422 U.S. at 344, 95 S.Ct. at 2289. In *Hicks* the Court ruled that a three judge district court erred by not considering itself bound on the constitutionality of California's obscenity law by an earlier law by an earlier Supreme Court's dismissal of a challenge to that Act.[9]

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[9]The Court did describe the method the lower courts should follow in determining the effect to be given summary dismissals.

> "Of course, Miller II [*Miller v. California,* 418 U.S. 915, 94 S.Ct. 3206, 41 L.Ed.2d 1158] would have been decisive here only if the issues in Miller II and the present case were sufficiently the same that Miller II was a controlling precedent. Thus, had the District Court considered itself bound by summary dismissals of appeals by this Court, its initial task would have been to ascertain what issues had been properly presented in Miller II and declared by this Court to be without substance."

422 U.S. at 345 n. 14. 95 S.Ct. at 2290.

The significance of *Hicks* was clarified by the Court in *Mandel v. Bradley*, 1977, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199. In *Mandel* the lower court struck down Maryland's law regulating access to the ballot. The lower court relied on the Supreme Court's dismissal of *Tucker v. Salvera*, 1976, 424 U.S. 959, 96 S.Ct. 1451, 47 L.Ed.2d 727, *aff'g*, E.D.Pa.1975, 399 F.Supp. 1258. This reliance, the Court held, was misplaced:

> "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After *Salera*, for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional.
>
> . . . .
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> The precedential significance of the summary action in *Salera*, however, is to be assessed in the light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case."

432 U.S. at 176, 97 S.Ct. at 2240, 53 L.Ed.2d at 205. The different facts in *Mandel* were the differences between the Pennsylvania and Maryland statutes. Here, the Supreme Court has upheld disclosure provisions in

Washington, Illinois, and Maryland statutes. Each statute differs from the others; each differs from the Sunshine Amendment. The dismissals by the Supreme Court caution us against finding the Amendment unconstitutional. See *Mandel v. Bradley*, 432 U.S. 173, 179-80, 97 S.Ct. 2238, 2242, 53 L.Ed.2d 199, 206-07 (Justice Brennan, concurring). They did not relieve us of our duty "to undertake an independent examination of the merits". 432 U.S. at 177, 97 S.Ct. at 2241, 53 L.Ed.2d at 205. We now turn to that task.

II.

The American Civil Liberties Union, as amicus, argues that the amendment unconstitutionally burdens the right to run for office. If the amendment is upheld, the appellants say that they will resign. Other candidates will be deterred from running. The A.C.L.U. argues that this restriction on political activity equals or exceeds that caused by the filing fees invalidated by the Supreme Court in *Lubin v. Panish*, 1974, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 and *Bullock v. Carter*, 1972, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92.

The right to run for office is not a "fundamental" right. The Court has at times protected candidacy as a way to protect the right to vote itself.

> [T]he Court has not heretofore attached . . . fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least

> some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Bullock v. Carter, 405 U.S. at 142 43, 92 S.Ct. at 856. The Supreme Court has examined such restrictions in at least four contexts: loyalty oaths, *Communist Party v. Whitcomb*, 1974, 414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 635; residency and durational requirements, *McCarthy v. Philadelphia Civil Service Comm'n*, 1976, 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366 (per curiam); *Sununu v. Stark*, 1975, 420 U.S. 958, 95 S.Ct. 1346, 43 L.Ed.2d 435, *aff'd mem.* D.N.H.1974 (three judge court), 383 F.Supp. 1287; petition requirements for appearing on the ballot, *Storer v. Brown*, 1974, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714; *American Party v. White*, 1974, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744; and filing fees, *Lubin v. Panish*, 1974, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702; *Bullock v. Carter*, 1972, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92. The loyalty oaths and filing fees were invalidated, the residency and durational requirements were upheld, and dispositions of the petition requirements have varied.[10]

[10]Age requirements for officeholding, though widespread, have not been tested in the Supreme Court. Lower courts and commentators have agreed that they need bear only a rational relationship to state interests. *See, e.g., Manson v. Edwards*, 6 Cir. 1973, 482 F.2d 1076; Developments in the Law — Elections, 88 Harv.L.Rev. 1111, 1223-25. *But see* Note, Age and Durational Residency Requirements as Qualifications for Candidacy: A Violation of Equal Protection? 1973 U.Ill.L.F. 161, 177-78.

Disclosure requirements may deter some people from seeking office. As the Supreme Court has made clear, however, mere deterrence is not sufficient for a successful constitutional attack. *Bullock v. Carter*, 1972, 405 U.S. at 142-43, 92 S.Ct. 849. Otherwise, official salary levels or the location of the capital city might furnish the basis for a constitutional attack. The key to this issue is who is excluded. These requirements are not unconstitutional unless "they are so restrictive that they deny a cognizable group a meaningful right to representation". Tribe, American Constitutional Law, §13-19 (1978). See also Developments in the Law — Elections, 88 Harv.L.Rev. 1111, 1218, 1176-77 (1975). The loyalty oath cases clearly denied representation to groups with beliefs which could not be squared with the oath involved. The filing fee cases denied access to the ballot to poorly financed candidates. In *Bullock* the Court concluded that the fees had a "real and appreciable impact on the exercise of the franchise . . . related to the resources of the voters supporting a particular candidate . . . ." 405 U.S. at 144, 92 S.Ct. at 856. The connection with the group of poor voters prompted the scrutiny the law received. The petition requirements also struck at a group of voters, those outside the two major parties.

In contrast, the disclosure requirements do not limit the choices of any particular group of voters. There is no reason to believe that those most sensitive to their privacy will be Republicans or Democrats, liberals or conservatives, blacks or whites. Scrutiny is inappropriate as long as the requirement leaves "a sufficient number of candidates eligible to represent the views of any particular constituency", Developments in the Law — Elections, 88 Harv.L.Rev. 1111, 1218 (1975). As will be discussed in more detail below, this scheme does res-

pond to important state interests in a reasonable way. Absent scrutiny, it is therefore constitutional. *See* Note, Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws, 73 Mich.L.Rev. 758, 763-68 (1975) [hereafter cited as Fighting Conflicts of Interest[11]].

III.

Americans have a constitutional right to privacy. The right springs from several of the Bill of Rights amendments, and is incorporated in the due process protected by the fourteenth amendment.[12] *Griswold v. Connecticut*, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. Academic discussion of a right to privacy dates at least to the common law arguments of Louis Brandeis and Samuel Warren in 1890. Brandeis and Warren, The Right to Privacy, 4 Harv.L.Rev. 193

[11]Another possibly relevant distinction between this case and cases where the Supreme Court invalidated restriction is that disclosure acts merely as a deterrent. Unlike filing fees or petition requirements, it does not force anyone off the ballot. In light of our conclusions concerning the impact of the restriction, this distinction is unimportant.

[12]Some justices have seen privacy protected by the ninth amendment. *See Griswold v. Connecticut*, 1965, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (Justice Goldberg concurring, joined by Chief Justice Warren and Justice Brennan). This seems to be a distinction without a difference. "This right of privacy, *whether it be founded in* the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [emphasis added]. *Roe v. Wade*, 1973, 410 U.S. 113, 153, 93 S.Ct. 705, 727, 35 L.Ed.2d 147.

(1890).[13] The volume of commentary has increased geometrically since then.[14] Yet, "[t]he concept of a constitutional right of privacy still remains largely undefined". Kurland, The Private I, The University of Chicago Magazine 7, 8 (Autumn 1976), *quoted in Whalen v. Roe*, 1977, 429 U.S. 589, 599 nn.24, 97 S.Ct. 869, 51 L.Ed.2d 64. In *Whalen* the Court made an effort to unsnarl some of the tangled strands of privacy.

[13]Justice Brandeis has been quoted over a 38 year period by parties on both sides of this question. His 1890 article marshalled common law support for an expansive right to privacy. *But see* Pratt, The Warren and Brandeis Argument for a Right to Privacy, 1975 Public Law. 161. Twenty-four years later, in a series of articles published during congressional consideration of what became of the Clayton Act, he advocated public disclosure of corporate financial arrangements in a passage which may have given this Amendment its name.

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

L. Brandeis, Other People's Money and How the Bankers Use It 62 (1914). Fourteen years later, in *Olmstead v. United States*, he dissented from a decision approving wiretapping, characterizing privacy as "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men". *Olmstead v. United States*, 1928, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944.

[14]A far from exhaustive list of the excellent articles and books in this area includes Gerety, Redefining Privacy, 12 Harv.Civ.R. — Civ.L.L. Rev. 233 (1977); Henkin, Privacy and Autonomy, 74 Colum.L.Rev. 1410 (1974); Bloustein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L.Rev. 41 (1974); A. Westin, Privacy and Freedom (1967); and, generally, XIII Nomos (1971).

> "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interest. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

429 U.S. at 598–600, 97 S.Ct. at 876. The senators argue that the Sunshine Amendment violates both strands of their privacy. We shall consider first the interest in independent decision-making, which might be called an interest in autonomy, and then consider the interest in avoiding disclosure, or confidentiality.

A.

The senators urge that disclosure of personal financial information adversely affects their familial affairs.

> The nature of financial investments, their wisdom, worth or desirability are matters decided by family councils for the family's benefit. Whether they should be exposed or protected from exposure is a matter of great family concern. Media publication of disclosed wealth can bring mischief, even kidnappers or other criminal attention to an office holder. Financial privacy is and ought to be protected from governmental intrusion . . . in the manner that marital and family privacy is protected.

Plante complaint, ¶12, app. at 5.

The senators are well-advised to try to tie their charges to domestic matters. The Supreme Court has characterized the autonomy branch of privacy as involving

> "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct."

Paul v. Davis, 1976, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405. *See also Paris Adult Theatre I v. Slaton*, 1973, 413 U.S. 49, 65–66, 93 S.Ct. 2628, 37 L.Ed.2d 446. When the Supreme Court has applied this analysis, it has carefully examined the state actions to determine whether they were the least restrictive means to reach a compelling goal.[15] After doing so, it has voided regulations concerning contraception, *Griswold v. Connecticut*, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; abortion, *Roe v. Wade*, 1973, 410 U.S. 113, 93 S.Ct.

[15]These privacy cases seem to involve a fusion, or confusion, of equal protection and due process standards. Least restrictive alternative and compelling state interest analysis have been used both for the "upper tier" of equal protection claims, those involving fundamental interests or suspect classifications, and for some first amendment and privacy claims. Although due process and equal protection arguments often may be transformed into each other, and although the standard of review may be the same under either characterization, there is value in maintaining the conceptual distinction. *See Zablocki v. Redhail*, 1978, 434 U.S. 374, 391–396, 98 S.Ct. 673, 683–86, 54 L.Ed.2d 618, 634–37 (Justice Stewart, concurring in the judgment). Privacy challenges are brought not as requests for equal protection, but as demands for due process.

705, 35 L.Ed.2d 147; and miscegenation, *Loving v. Virginia*, 1967, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. It has also adopted, as reflecting this analysis, the holdings of earlier cases concerning education of children, *Pierce v. Society of Sisters*, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; *Meyer v. Nebraska*, 1923, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, and compulsory sterilization, *Skinner v. Oklahoma*, 1942, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655. *See Paris Adult Theatre I v. Slaton*, 413 U.S. at 65–66, 93 S.Ct. 2628; *Whalen v. Roe*, 429 U.S. at 600 n.26, 97 S.Ct. 869. Our question is whether the senators' argument fits within this field.

The parties suggest two different tests for determining whether their privacy interest is subject to this protection. They offer the formulation from *Meyer v. Nebraska*, 1923, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 that

> "While this Court has not attempted to define with exactness the liberty thus guaranteed [by the fourteenth amendment] . . . [w]ithout doubt, it denotes not merely the freedom from bodily restraint but also the right of the individual . . . , generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

The defendants, and the district court, prefer the language the Court used in *Palko v. Connecticut*, 1937, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, concerning rights "implicit in the concept of ordered liberty". Neither standard appears helpful. Both authorities are

of questionable strength. *Meyer* comes to us from the heyday of substantive due process analysis. *Palko's* specific holding was overruled in *Benton v. Maryland*, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. Its broader significance is as a statement of the ultimately unsuccessful position in the "incorporation debate" concerning the fourteenth amendment. *See Adamson v. California*, 1947, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (especially Frankfurter, J., concurring, and Black, J., dissenting) and *Duncan v. Louisiana*, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (Black, J., concurring). *See generally*, G. Gunther, Constitutional Law 506–47 (9th ed. 1975).[16] Even if these statements maintain their full precedential weight, their words provide no easy answers. Therefore, we turn to cases concerning financial privacy, and to the considerations which support the autonomy branch of the right to privacy.

The senators rely on language from Justice Powell's concurring opinion in *California Bankers Ass'n v. Shultz*, 1974, 416 U.S. 21, 78, 94 S.Ct. 1494, 39 L.Ed.2d 812. *California Bankers Ass'n* was a challenge to recordkeeping and disclosure requirements imposed by the Bank Secrecy Act of 1970, 12 U.S.C. §§1829b, 1730d, 1951–59. The Secretary of the Treasury was authorized to require banks to keep records of and report domestic and international transactions. The Court avoided most of the first and fifth amendment challenges to the Act, and concentrated on the fourth amendment arguments. Justice Powell, joined by Justice Blackmun, concurred in the opinion of the Court upholding the requirements. He was troubled, however, by the Act's domestic

[16] *Palko* was quoted with approval, however, in *Roe v. Wade*, 1973, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147.

reporting requirements. These empowered the Secretary to require reports from financial institutions of domestic monetary transactions and the parties involved. Justice Powell concurred because the regulations promulgated by the Secretary required reporting only currency transactions of more than $10,000. He found the requirement unobjectionable, but only because it was narrowed by the regulations.

> "A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy."

416 U.S. at 78–79, 94 S.Ct. at 1526.

This language was quoted with approval by the majority of the Court in *Buckley v. Valeo*, 1976, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659.

> "Moreover, the invasion of *privacy of beliefs* may be as great when the information concerns the giving and spending of money *as when it concerns the joining of organizations*, for 'financial transactions can reveal much about a person's activities, associations, and beliefs'." [emphasis added]

424 U.S. at 66, 96 S.Ct. at 657. Justice Powell's discussion in *California Bankers* may have concerned privacy issues pure and simple. His mention of "intimate areas of an individual's personal affairs" suggests as much. The majority in *Buckley*, however, used that language in a different context. Both the language quoted above and the context from which it was taken show that the Court's concern was with the effects of disclosure on the first amendment freedom of association. The Court believed that the case potentially raised issues similar to those raised in *N.A.A.C.P. v. Alabama ex rel. Patterson*, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488. That is a constitutional question we address below. It is not a question concerning the autonomy branch of the right to privacy. Although the Court has not explicitly rejected placing financial matters within the autonomy right, Justice Powell's *California Bankers* concurrence, as cited by the Court in *Buckley*, does not show that the Court has adopted that position.[17] The only other federal authority we have discovered rejected the applicability of the autonomy privacy right to financial information. *O'Brien v. DiGrazia*, 1 Cir. 1976, 544 F.2d 543.

The California Supreme Court came to the opposite conclusion. In *City of Carmel-by-the-Sea v. Young*,

[17]The dismissals for want of a substantial federal question in *Fritz v. Gorton*, *Stein v. Howlett*, and *Montgomery County v. Walsh*, seem to indicate the opposite. Justices Powell and Blackmun did not dissent from those dispositions, but they would have granted certiorari in the other case presenting these issues which has reached the Supreme Court, *Trooper's Lodge No. 41 v. Walker*, 1974, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656. (Justice Douglas wrote a brief statement supporting the denial of certiorari on grounds other than those advanced by the parties or the lower court).

1970, 2 Cal.3d 259, 85 Cal.Rptr. 1, 466 P.2d 225, that Court invalidated a sweeping disclosure law that required *every* public officer to file financial statements covering himself and his family. The Court relied on an earlier California case, *People v. Edwards*, 1969, 71 Cal.2d 1096, 80 Cal.Rptr. 633, 458 P.2d 713. In *Edwards* the Court held that the fourth amendment prohibited a search of outdoor trashcans because they were "adjunct[s] to the domestic economy", 80 Cal.Rptr. at 638, 458 P.2d at 718. In *Carmel* the Court held:

> "[T]he right of privacy concerns one's feelings and one's own peace of mind . . . and certainly one's personal financial affairs are an essential element of such peace of mind. Moreover, personal financial affairs are clearly more than the 'adjunct to the domestic economy' referred to in *Edwards* . . . instead they would appear to constitute the primary supporting pillar of that economy. In any event we are satisfied that the protection of one's personal financial affairs, and those of his (or her) spouse and children against compulsory public disclosure is an aspect of the zone of privacy which is protected . . . ."

85 Cal.Rptr. at 7, 466 P.2d at 231-32.

City of Carmel has been heavily criticized, both for its use of *Edwards* and for its conclusion.[18] Analysis of the roots of the autonomy branch of privacy convinces us that the critics are right.

There are two ways in which financial privacy could fall within the autonomy branch of the right to privacy. Financial privacy might itself involve the kind of crucial decision-making protected by the Constitution. Alternatively, financial disclosure might have such a strong impact on making familial decisions, those decisions which are clearly within the privacy right, that it must be prohibited to protect those choices.

Financial privacy does not fall within the autonomy right on its own. The essence of that right is "the interest in independence in making certain kinds of important decisions". *Walen v. Roe*, 429 U.S. 599-600, 97 S.Ct. 876. Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process. Their effect on financial decisions is more indirect. They might deter some decisions. More basically, however, disclosure laws do not involve decisions as important as those in the earlier decided cases.

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[18] *See* Note, Fighting Conflicts of Interest, 73 Mich.L.Rev. 758 (1975); Note, 45 Tulane L.Rev. 167 (1970); Note, The Constitutionality of Financial Disclosure Laws, 59 Cornell 345 (1974); Staines, A Model Act for Controlling Public Corruption Through Financial Disclosure and Standards of Conduct, 51 Notre Dame Law, 636 (1976). The case was received less critically by Note, 49 Texas L.Rev. 346 (1971) and Comment, Financial Disclosure by Public Officials and Public Employees in Light of *Carmel-by-the-Sea v. Young*, 18 U.C.L.A.L.Rev. 534 (1971).

Our society has long regulated people's finances. Interference with business activity, through licensing, taxing, and direct regulation, is common. All these governmental actions impinge on the ability of the individual to order his financial affairs. They do so directly. The indirect effects caused by financial disclosure pale by comparison. At one time "liberty of contract" was recognized as a major, if not the major, component of the liberty guaranteed by the fourteenth amendment. *See, e.g., Allgeyer v. Louisiana,* 1897, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832. *See generally* R. McCloskey, American Conservatism in the Age of Enterprise: 1865-1910, 72-126 (1951). That is no longer the case.

By contrast, the family-linked concerns protected by the autonomy branch of the right to privacy are also strongly protected in non-privacy contexts. In *Cleveland Board of Education v. LaFleur,* 1974, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52, the Court used irrebuttable presumption analysis to strike down mandatory maternity leaves for pregnant teachers. In *Zablocki v. Redhail,* 1978, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, the Court invalidated a Wisconsin statute which prohibited marriage by certain residents without court permission. In *Boddie v. Connecticut,* 1971, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, the Court held that indigents may obtain divorces without paying filing fees. The language of the opinion stresses the significance of marriage, a significance enhanced by the Court's later rejection of a similar argument aimed at bankruptcy filing fees. *United States v. Kras,* 1973, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626. In *Moore v. City of East Cleveland,* 1977, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531, four of the Justices stated that the family unit was

entitled to constitutional protection as a matter of substantive due process. The family-related barriers erected by the right to privacy stem from legal protections for the family and matters directly affecting the family, much broader.than the legal protection accorded personal finances. These, in themselves, are not the kinds of decisions protected by the autonomy branch of the right to privacy.

Nor can they be protected as incident to protection of the family. The appropriate question is: What impact will financial disclosure have upon the way intimate family and personal decisions are made? Will it affect the decision whether to marry? Will it determine when or if children are born? There is no doubt that financial disclosure may affect a family, but the same can be said of any government action. While disclosure may have some influence on intimate decision-making, we conclude that any influence does not rise to the level of a constitutional problem.

The Court has limited the horizontal reach of the privacy right in similar situations. In *Whalen v. Roe,* 1977, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64, the Court assumed that protection of the autonomy right could extend to decisions concerning medical care. It recognized that the state law requiring that records be kept concerning some drug prescriptions had discouraged the use of those drugs. 429 U.S. at 603, 97 S.Ct. 869. This was held to have insufficient effects on the patients' decisions to constitute an invasion of the patients' rights. Similarly, in *Planned Parenthood of Central Missouri v. Danforth,* 1976, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, the Court upheld record-keeping requirements for abortions over an objection

that this would be governmental interference with the woman's choice. Finally, in *Poelker v. Doe*, 1977, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528; *Maher v. Roe*, 1977, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484, and *Beal v. Doe*, 1977, 432 U.S. 439, 97 S.Ct. 2366, 53 L.Ed.2d 464, the Court held that neither states participating in the medicaid program nor cities operating municipal hospitals need provide free abortions to indigent women. Although the cost of an abortion operates as a much stronger influence on the choice involved than does financial disclosure in this case, the Court held that government actions which did not work as a bar to abortions would not be subject to scrutiny. *Maher v. Roe*, 432 U.S. at 471-75, 97 S.Ct. 2381-83, 53 L.Ed.2d 493-95. If such strong secondary effects on family do not demand scrutiny, this financial disclosure law cannot require a close examination because of its impact on the family.[19]

Financial privacy is not within the autonomy branch of the right to privacy. Disclosure does not directly affect such fundamental decisions that "we are

[19]A similar distinction between direct and indirect impacts on the family was made by the Court in *Zablocki v. Redhail*, 1978, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, 631 n.12. *Zablocki* directly forbade certain marriages. In *Califano v. Jobst*, 1977, 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228, the Court upheld sections of the Social Security Act which terminated benefits upon marriage to an individual not entitled to benefits under that Act in the face of arguments that this restricted the right to marry. Justice Marshall, for the Court, found the difference in the "directness and substantiality of the interference", 434 U.S. 374, 98 S.Ct. 673, 681, 54 L.Ed.2d 618, 631 n.12. In *Jobst*, there was "no evidence that the laws significantly discouraged, let alone made 'practically impossible', any marriages." *Id.* Justice Rehnquist, dissenting, in *Zablocki*,, felt that *Jobst* was not distinguishable.

deprived of control over such intimacies of our bodies and minds as to offend what are ultimately shared standards of autonomy". Gerety, Redefining Privacy, 12 Harv.Civ.R.-Civ.L.L.Rev. 233, 268 (1977). Nor is its indirect effect on intimate decisions as strong as some which the Court has held do not invoke strong constitutional protection. The district court properly concluded that the senators cannot bring their complaint within this branch of the right to privacy.

B.

There is another strand to the right to privacy properly called the right to confidentiality. *See* Gerety, Redefining Privacy, 12 Har.Civ.Civ.L.Rev. 233 (1977). The Supreme Court has defined this branch as "the individual interest in avoiding disclosure of personal matters". *Whalen v. Roe*, 429 U.S. at 599, 97 S.Ct. at 876.

In the constitutional arguments we have considered thus far, the senators failed because their complaints were not within the scope of the rights involved. Their contentions do fall directly within this right. Our problem in this section is 5o determine the proper standard of review of their claims, then apply it. The answer is not easy.

This case is not analogous to cases requiring disclosure of organizational membership. *See N.A.A.C.P. v. Alabama ex rel. Patterson*, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, *Shelton v. Tucker*, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; *Bates v. City of Little Rock*, 1960, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 1961,

366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301. Those cases prevented states from requiring disclosure of membership in the N.A.A.C.P., either through requiring that individuals disclose their membership, *Bates v. City of Little Rock*, or that the organization disclose its members. In those times and places the attempted restraint on the freedom of association was patent. Similarly, *Buckley v. Valeo*, 1976, 424 U.S. 1, 60-84, 96 S.Ct. 612, 46 L.Ed.2d 659, discussed campaign contributor disclosure in the context of "privacy of *association* and *belief* guaranteed by the First Amendment". [emphasis added] 424 U.S. at 29, 96 S.Ct. at 640. *Cf. Talley v. California*, 1960, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (striking down ordinance prohibiting anonymous pamphlets). Such disclosure requirements, because they strike at first amendment freedoms, "must survive exacting scrutiny". *Buckley*, 424 U.S. at 64, 96 S.Ct. 612.

Here, memberships, associations, and beliefs are revealed, if at all, only tangentially. The Amendment calls for disclosure of assets, debts, and sources of income, each to be identified and valued. Although in some particular situations, rigorous application of the Amendment might implicate first amendment freedoms, when considering the Amendment on its face this threat is too remote to raise the issue.[20]

[20]Without implying any views on the merits of a suit which properly raised the issue, we feel a substantial constitutional issue might be raised by disclosure of one's income tax returns. Such disclosure could be troublesome if it were to reveal the nature of various contributions made by the official or candidate, such as contributions to a church, a political party, or a charity. Regulations by the Commission on Ethics might, of course, eliminate any threat of such sensitive revelations. The issue must await another case.

The Supreme Court has twice explicitly considered the confidentiality strand of privacy. In *Whalen v. Roe*, 1977, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64, the challenge to New York's prescription reporting requirement was based on both branches of privacy analysis. The Court did not discuss the standard to be applied to public disclosure, because it determined that the chance of such disclosure occurring was minimal. Legally, such information could be used only in judicial proceedings. The state made unauthorized disclosure a crime punishable by up to a year in prison and a $2,000 fine. The Court discussed in some detail the extensive security surrounding the data. 429 U.S. at 593–95, 97 S.Ct. 869. The possibility of ineffective judicial protection of information used in criminal proceedings was held to be too remote to lead to invalidation of the program. The Court then distinguished the disclosure to employees of the state, who are under a duty to keep it confidential, from disclosure to the public. Such disclosure was held to raise no more substantial constitutional question than many widely accepted reporting requirements. 429 U.S. at 602, 97 S.Ct. 869. Because it determined that *public* disclosure was unlikely, the Court did not address the standard to be applied to such public disclosure.

The other Supreme Court decision concerning this right is *Nixon v. Administrator of General Services*, 1977, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867. The *Nixon* case arose as a result of the Presidential Recordings and Materials Preservation Act, Pub.L. 93–526, Title I, note following 44 U.S.C. §2107. The Act purported to cover the disposition of the 42 million pages of material and 880 tape recordings accumulated by ex-president Nixon. The Act, as implemented by the

Administrator's regulations, provided that professional archivist would examine all the materials and cull all personal material from the documents. The Court pointed out that screening was essential to assure the public that all the public documents were in fact retained and preserved. Although recognizing that Nixon had a legitimate expectation of privacy in at least some of the materials, the Court balanced the interests involved and upheld the law. The public interest was important; the screening essential; the government archivists "unblemished"; and the intrusion limited. 433 U.S. at 455–65, 97 S.Ct. at 2796–2802, 53 L.Ed.2d at 899–905.

Nixon does not resolve our problem. The case involved not public disclosure but viewing and screening of public and private documents by archivists. The material which the Court and Nixon worried about included "extremely private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files". 433 U.S. at 459, 97 S.Ct. at 2798, 53 L.Ed.2d at 901. The Court did not speak in usual terms of standard of review. The Court found the Act's invasion of President Nixon's privacy potentially troubling, but "balanced" the interests and termed the Act "reasonable". It also stressed that there were *no* alternatives to some screening.[21]

[21]In *Nixon v. Warner Communications, Inc.*, April 18, 1978, ____U.S. ____, 98 S.Ct. 1306, 55 L.Ed.2d 570, the Supreme Court held that tape recordings used as evidence in the trial of several Watergate defendants need not be released to the public. The decision did not include any discussion of anyone's right to privacy.

The Supreme Court has provided little specific guidance.[22] Although in the autonomy strand of the right to privacy, something approaching equal protection "strict scrutiny" analysis has appeared, we believe that the balancing test, more common to due process claims, is appropriate here. The constitutionality of the amendment will be determined by comparing the interests it serves with those it hinders.[23]

The balancing standard seems appropriate. In equal protection cases the Supreme Court has warned against giving heightened attention to cases involving new "fundamental interests". *San Antonio Independent School District v. Rodriguez*, 1973, 411 U.S. 1, 33–34, 98 S.Ct. 1278, 36 L.Ed.2d 16. The Court has avoided proclaiming such a standard in the two cases raising the issue in which it issued opinions, *Whalen v. Roe* and *Nixon v. Administrator of General Services*. It has dismissed for want of a substantial federal question three cases raising the question in financial disclosure contexts. *Montgomery Co. v. Walsh*, 1975, 274 Md. 502, 336 A.2d 97, *app. dism'd*, 1976, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306; *Fritz v. Gorton*, 1974, 83 Wash.2d 275, 517 P.2d 911, *app. dism'd*, 1974, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208; *Stein v. Howlett*, 1972, 52 Ill.2d 570, 289 N.E.2d 409, *app. dism'd*, 1973, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152; *see* discussion above at 5–7.

[22]Except, of course, through the dismissals for want of substantial federal questions noted above.

[23]This may be consistent with the standard of review used in the "autonomy" branch of privacy cases. Rather than consider "compelling state interest" a label for immuizing circumstances, it might reflect merely the great weight on the state's end of the traditional balancing test.

Subjecting financial disclosure laws to the same scrutiny accorded laws impinging on autonomy rights, such as marriage, contraception, and abortion, would draw into question many command forms of regulation, involving disclosure to the public and disclosure to government bodies.[24]

At the same time, scrutiny is necessary. The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be demonstrated. Otherwise, public disclosure requirements such as Florida's could be extended to anyone, in any situation.[25]

[24]The government requires many kinds of financial disclosure from its citizens. The federal income tax is the best known. Although the 1040 form is not well-loved, it is widely accepted both by the general public and as a matter of constitutional law. *Cf. United States v. Sullivan*, 1927, 274 U.S. 259, 47 S.Ct 607, 71 L.Ed. 1037, upholding a conviction for failure to file an income tax return against a Fifth Amendment claim. Social Security tax law requires employers to tell the federal government the names, addresses, and compensation of all their employees. Some public disclosure is required by the securities laws and regulations thereunder. *E. g.*, Securities Act of 1933,§10(a)(1) and Schedule A(4), (14), 15 U.S.C. §§77j(a)(1), 77aa(4), (14), requiring disclosure of names, addresses, and remuneration of directors and officers in the prospectus; Securities Exchange Act of 1934 §16(a), 15 U.S.C. §78p(a), requiring insiders to disclose the amount and monthly changes in the amount of their direct and indirect holdings of their company's stock.

[25]In this context it is interesting that the two state courts that did strike down disclosure laws for privacy reasons struck down laws that applied to local employees and minor officials as well as high state officials. The Michigan Court expressly found the statute sufficiently narrow for some high officials. *City of Carmel-by-the-Sea v. Young*, 1970, 2 Cal.3d 259, 85 Cal.Rptr. 1, 466 P.2d 225; Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2 10), 1976, 396 Mich. 465, 242 N.W.2d 3.

The district court found that four important state concerns are significantly advanced by the Amendment: the public's "right to know" an official's interests, deterrence of corruption and conflicting interests, creation of public confidence in Florida's officials, and assistance in detecting and prosecuting officials who have violated the law. The importance of these goals cannot be denied. The question is whether the Sunshine Amendment significantly promotes them.

What the district court called the public's "right to know" is promoted by the Amendment. This phrase, however, is misleading. Disclosure is helpful not because it fulfills an independent "right", but because it makes voters better able to judge their elected officials and candidates for those positions. All of the officials covered by the Amendment are elected. It is relevant to the voters to know what financial interests the candidates have. As the Supreme Court said, in discussing campaign contributions, the knowledge will "alert the voter to the interests to which a[n official] is most likely to be responsive". *Buckley v. Valeo*, 424 U.S. at 67, 96 S.Ct. at 657.

The senators contend that the Amendment will not stop corruption. They make the reasonable point that few officials are likely to make a public disclosure of illegal income. Yet, the existence of the reporting requirement will discourage corruption. Sunshine will make detection more likely. The interest in an honest administration is so strong that even small advances are important.

The Amendment will not overnight restore (or create) public confidence in Florida's government.

Although the events of recent years may have strengthened the Sunshine Amendment, cynicism about public officials is not a new, and easily reversed, phenomenon. Disclosure may not completely remove this doubt. It should help, however. And more effective methods are not obvious.

The fourth interest discussed by the district court, aiding detection and prosecution of violations, seems less affected by the Amendment than the others. While misdeeds may be deterred by the need to file either honest or perjurious financial statements, once they have been committed, the statements may well be useless.

The Supreme Court has considered the first, second, and fourth goals in the context of campaign contribution disclosure. The Court held them strong enough to outweigh any infringement on first amendment rights caused by the Act. *Buckley v. Valeo*, 424 U.S. at 66-68, 96 S.Ct. 612. The Supreme Court of Florida, in upholding the legislative percursor of this amendment, found that "Florida has a compelling interest in protecting its citizens from abuse of the trust placed in their elected officials". *Goldtrap v. Askew*, Fla.1976, 334 So.2d 20, 22.

Ranged against these important interests are the senators' interests in financial privacy. Their interest is substantial. For better or for worse, money too makes the world go round. Financial privacy is important not only for the reasons the California Supreme Court accepted: the threat of kidnapping, the irritation of solicitations, the embarrassment of poverty. *City of Carmel-by-the-Sea v. Young*, 1970, 2 Cal.3d 259, 85

Cal.Rptr. 1, 9, 466 P.2d 225, 233. When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally, as discussed above, and at common law. *See, e.g., Santiesteban v. Goodyear Tire & Rubber Co.*, 5 Cir. 1962, 306 F.2d 9 (malicious repossession of goods in public may state privacy claim).

The extent of the interest is not independent of the circumstances. Plaintiffs in this case are not ordinary citizens, but state senators, people who have chosen to run for office. That does not strip them of all constitutional protection. *Nixon v. Administrator of General Services*, 433 U.S. 425 at 457, 97 S.Ct. 2777 at 2797, 53 L.Ed.2d 867 at 900. It does put some limits on the privacy they may reasonably expect. The first amendment puts much greater restrictions on libel and slander actions by public officials or public figures than similar actions by private parties. *New York Times v. Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, established that public official must show "actual malice" to recover for libel. A public official, for purposes of the *New York Times* test, includes elected officials and candidates for those positions, appointed officials, and employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs". *Rosenblatt v. Baer*, 1966, 383 U.S. 75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597. By comparison, private parties need only show fault of some kind to recover actual damages. *See Gertz v. Robert Welch, Inc.* 1974, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789; *Time, Inc. v. Firestone*, 1976, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154. Even in financial matters, public officials usually have less privacy than their

private counterparts. The salaries of most officials, including federal judges, are matters of public record.

Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger. We join the majority of courts considering the matter and conclude that mandatory financial disclosure for elected officials is constitutional.[26]

That does not end our inquiry. The senators focus their contentions on three specific features of the Amendment: the requirement that values be assigned to assets, the requirement that secondary sources of income be disclosed, and the publication of their financial statements. Each of these features must be individually examined, its incremental benefits balanced against the added violation of the officials' privacy.

[26]*See Fritz v. Gorton*, 1974, 83 Wash.2d 275, 517 P.2d 911, *app. dism'd*, 1974, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208; *Stein v. Howlett*, 1972, 52 Ill.2d 570, 289 N.E.2d 409, *app. dism'd*, 1973, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152; *Montgomery County v. Walsh*, 1975, 274 Md. 502, 336 A.2d 97, *app. dism'd*, 1976, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306; *County of Nevada v. MacMillen*, 1974, 11 Cal.3d 662, 114 Cal.Rptr. 345, 522 P.2d 1345; *Evans v. Carey*, 1976, 53 A.D.2d 109, 385 N.Y.S.2d 965, *aff'd*, 1977, 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983; *Goldtrap v. Askew*, Fla. 1976, 334 So.2d 20; *Illinois State Employees Ass'n v. Walker*, 1974, 57 Ill.2d 512, 315 N.E.2d 9, *cert. den. sub nom. Troopers Lodge No. 41 v. Walker*, 1974, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656; *In re Kading*, 1976, 70 Wis.2d 508, 235 N.W.2d 409; *Klaus v. Minnesota Ethics Comm'n*, 1976, 309 Minn. 430, 244 N.W.2d 672; *Kenny v. Byrne*, App.Div. 1976, 144 N.J.Super. 243, 365 A.2d 211

The senators cite language from state court opinions which approve schemes using dollar ranges rather than exact figures.[27] They argue that all of the benefits of the statute could be obtained by requiring only ranges of value, rather than demanding specific figures. Their argument is unconvincing. While sufficiently narrow ranges would convey much useful information, increasing the specificity will increase the value

[27]*See County of Nevada v. MacMillen*, 1974, 11 Cal.3d 662, 114 Cal.Rptr. 345, 350, 522 P.2d 1345, 1350 ("Moreover, unlike the 1969 act, the 1973 act does not require disclosure of the actual extent of the official's assets and interests, but only whether the value of his investment or real property interest exceeds $10,000 . . ."); *In re Kading*, 1976, 70 Wis.2d 508, 235 N.W.2d 409, 418 ("Most importantly, neither the dollar value nor the quantity of the assets need be disclosed."); *Klaus v. Minnesota State Ethics Comm'n*, 1976, 309 Minn. 430, 244 N.W.2d 672, 676 ("Nothing in our statute requires a candidate to disclose his net worth or the amount of his income, information which is traditionally personal and privileged.").

of the information.[28] Acknowledging an asset worth $13,217 is little more an invasion of privacy than stating that the asset is worth between $10,000 and $15,000. While the incremental benefit may be slight, the incremental harm is even slighter.

The Amendment states that the rules governing the financial statement shall require "disclosure of secondary sources of income". The Amendment offers an alternative to any statement of income sources: the official may file a copy of his federal income tax return. The secondary source requirement is effective only if the official chooses not to do so. The meaning of "secondary source" is unclear. The senators' brief suggests the Amendment demands that "names of patients and clients who pay for non-govermental services from these part-time public officers be revealed". Appellants' brief at 23. In oral argument the State maintained that this depended on the nature of the officer's employer. A lawyer-legislator working for a law firm could list income source as the law firm; a sole practitioner would have to list all clients who paid more than $1,000 in fees.

[28]The Illinois Supreme Court quoted the trial judge to make this point in *Illinois State Employees Ass'n v. Walker*, 1974, 57 Ill.2d 512, 315 N.E.2d 9, *cert. den. sub nom. Troopers Lodge No. 41 v. Walker*, 1974, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656:

> "While full financial disclosure is burdensome, anything less would be ineffective in accomplishing the goal. The disclosure of only the sources of significant business interests and substantial amounts of income, as under the Ethics Act [Ill.Rev.Stat. 1973, ch. 127, par. 601 et seq.], is useful as far as it goes, but the information exempted is such that much corruption may go undetected. It is misleading, and ultimately undermining of public confidence, to institute a disclosure program having exemptions as broad as the coverage. *The inclusion of dollar amounts is justified because it allows for detection of many more types of unethical conduct.*" [emphasis added]

315 N.E.2d at 17.

The interest of the State in knowing who provided an official with income is clear. This argument is troubling only because rights of third parties intrude. A doctor's patients or a lawyer's clients may have confidential relationships protected by state law; customers and clients of other fields may also be entitled to some sort of protection. At least two state courts have considered this problem. the Missouri Supreme Court upheld a requirement that lawyers reveal for publication the names of their clients and the fees received from them. The Court found that the attorney-client privilege was not a barrier to the law. It pointed out that declaratory judgment actions could be brought on a case by case basis for exemptions from this requirement. *Chamberlin v. Missouri Elections Commission*, Mo. 1976, 540 S.W.2d 876. The Alaska Supreme Court came to the opposite conclusion in a suit brought by a doctor. The doctor challenged the disclosure requirement by asserting the privacy rights of his patients. The Court allowed this assertion of a third party's rights, and held that rules would be necessary to provide for some exemptions from the requirement. The Court was not troubled by disclosure in most cases, but felt that some visits would demand confidentiality, as when the doctor was a psychiatrist specializing in treating sexual problems. *Falcon v. Alaska Public Offices Commission*, Alaska 1977, 570 P.2d 469.

No clients or patients are parties to this suit. The senators have not tried to assert the interests of their clients or customers. The shape of the secondary source requirement is unclear. If precise regulations on this matter have been promulgated by the Florida Commission on Ethics, we have not found them. Commission regulations might allow exemptions in sensitive situations. The Amendment provides an option, the federal tax return, which eliminates any need to itemize income sources. On the record before us, we cannot invalidate this feature of the Amendment. We intimate no opinion as to the outcome of a challenge to the application of the secondary source requirement in some specific situation.

The senators' final complaint is that the State's interests would be served just as well by limiting disclosure to the Florida Commission on Ethics. This could deter some corruption, restore some public confidence, and detect some malfeasance. But the Florida voters have decided that it could not provide the voting public with the valuable information public disclosure creates: something more is needed. This educational feature of the Amendment serves one of the most legitimate of state interests: it improves the electoral process. That goal, recognized as important by the Supreme Court in *Buckley*, can be met in no other way. That goal justifies public publication of the senators' financial statements.

IV.

We have reviewed the senators' constitutional arguments. The district court dismissed their complaint for failure to state a claim upon which relief could be granted. In *Conley v. Gibson*, 1957, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, the Supreme Court held:

> "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

This case meets that test. To be sure, difficult questions are presented by the senators, but they are questions of law, not of fact. Our deliberations have led us to conclude that no law exists to support the senators' complaint.

We are not insensitive to the senators' dilemma; nor do we doubt the sincerity of their opposition to the Amendment. Their privacy, and the privacy of the others included in the Amendment, is severely limited by it. We do not say that it is wise: the people of Florida, by a four to one vote, have done that. We do say that, on its face, it is constitutional. The judgment of the district court is

AFFIRMED.

APPENDIX A

§112.3145

(2) (a) A person seeking nomination or election to a state or local elective office shall file a statement of financial interests together with, and at the same time he files, his qualifying papers.

(b) Each state or local officer and each specified employee shall file a statement of financial interests no later than 12 o'clock noon of July 15 of each year, including the July 15th following the last year he is in office. Each state or local officer who is appointed and each specified employee who is employed shall file a statement of financial interests within 30 days from the date of appointment or, in the case of specified employees, from the date on which the employment begins, except that any person whose appointment is subject to confirmation by the Senate shall file prior to confirmation hearings or within 30 days from the date of appointment, whichever comes first.

(c) State officers and specified employees shall file their statements of financial interests with the Secretary of State. Local officers shall file their statements of financial interests with the Clerk of the Circuit Court of the county in which they are principally employed or are residents. Persons seeking to qualify as candidates for public office shall file their statements of financial interests with the officer before whom they qualify.

(3) The statement of financial interests for state officers, specified employees, local officers, and persons

seeking to qualify as candidates for state or local office shall be filed even if the reporting person holds no financial interests requiring disclosure, in which case the statement shall be marked "not applicable". Otherwise, the statement of financial interests shall include:

(a) All sources of income in excess of 5 percent of the gross income received during the disclosure period by the person in his own name or by any other person for his use or benefit, excluding public salary. However, this shall not be construed to require disclosure of a business partner's sources of income. The person reporting shall list such sources in descending order of value with the largest source first.

(b) All sources of income to a business entity in excess of 10 percent of the gross income of a business entity in which the reporting person held a material interest and from which he received an amount which was in excess of 10 percent of his gross income during the disclosure period and which exceeds $1,500. The period for computing the gross income of the business entity is the fiscal year of the business entity which ended on, or immediately prior to, the end of the disclosure period of the person reporting.

(c) The location and description of real property in this state, except for residences and vacation homes, owned directly or indirectly by the person reporting, when such person owns in excess of 5 percent of the value of such real property, and the general description of any intangible personal property worth in excess of 10 percent of the person's total assets. For the purposes of this paragraph indirect ownership shall not include ownerships by a spouse or minor child.

(d) A list of all persons, business entities, or other organizations, and the address and a description of the principal business activity of each, from whom he received a gift or gifts from one source, the total of which exceeds $100 in value during the disclosure period. The person reporting shall list such benefactors in descending order of value with the largest listed first. Gifts received from a parent, grandparent, sibling child, or spouse of the person reporting, or from a spouse of any of the foregoing; gifts received by bequest or devise; gifts disclosed pursuant to s. 111.011; or campaign contributions which were reported as required by law need not be listed. For purposes of this paragraph a debt on which a preferential rate of interest substantially below the rate charged under the then customary and usual circumstances is charged shall be deemed a gift of an amount equal to the amount represented by the difference between the preferential and customary rate charged on the debt.

(e) Every debt which in sum equals more than the reporting persons's net worth.

APPENDIX B

The Amendment has several different provisions. Disclosure of campaign finances is required by subsection (b). Subsection (c) makes employees or officials who breach their trust, and persons who induce the breach, liable to the state for the amount of damages. Conviction of a felony involving breach of public trust forfeits the official's pension rights, according to subsection (d). Subsection (e) provides that covered officials may not represent others before boards on which they sat for two years following the end of their term. Legislators may represent clients during their term of office only before judicial tribunals. Subsection (f) establishes an independent commission to investigate and report alleged abuses. This commission is later identified as the Florida Commission on Ethics, established by the 1974 legislation.

The full text, as relevant to financial disclosure, follows.

Ethics in Government. —

A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:

(a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.

. . . .

(g) This section shall not be construed to limit disclosures and prohibitions which may be established by law to preserve the public trust and avoid conflicts between public duties and private interests.

(h) Schedule — On the effective date of this amendment and until changed by law:

(1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:

a. A copy of the person's most recent federal income tax return; or

b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.

(2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsection (h)(1).

(3) The independent commission provided for in subsection (f) shall mean the Florida Commission on Ethics.

KENNETH M. MYERS,

Petitioner,

v.

PAULA F. HAWKINS, Chairman, WILLIAM T. MAYO, Commissioner, and WILLIAM H. BEVIS, Commissioner, of and constituting the FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

Case No. 52,639

(ENGLAND, C.J.) We are asked by Kenneth M. Myers, a member of The Florida Bar and an elected state senator, to review an order of the Florida Public Service Commission which prohibits him from practicing before that agency. The genesis of the present controversy was Myers' request for a declaratory statement from the Commission, pursuant to Section 120.565, F.S. (1977), as to whether he would be permitted to continue practicing before the Commission[1] following the 1976 adoption by the voters of Florida of the so-called "Sunshine Amendment" to the Florida Constitution.[2] Among the provisions added to the Constitution by that amendment was Article II, Section 8(e), which provides in pertinent part:

"No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals."

The principal issues before us are whether the Public Service Commission is a "judicial tribunal" within the meaning of this provision, and if not whether the amendment applies to legislators in office on its effective date.

* * * *

III

Inasmuch as Article II, Section 8(e), bars the appearance of legislators before the Public Service Commission, we are forced to consider whether the prohibition extends to legislators in office when it became effective.[22] The issue is a difficult one. In addition to the complexity of the narrow legal question posed, it is apparent that our decision with respect to the applicability to incumbent legislators of the "during term" prohibition in Section 8(e) will determine as well the applicability, to a variety of incumbent officeholders, of the two-year "after term" ban, containing identical

22. Although this issue was not originally argued by the parties, the Court on its own motion directed that the parties file supplementary briefs addressing this question. See Fla. R.App.P. 9.040(a). As noted earlier, Myers has served in the Florida Senate continuously since 1968. His present four-year term began on November 2, 1976.

operative language, which appears as the first sentence of the same constitutional provision.[23]

We can quickly dismiss any concern that Section 8(e) has retroactive effect with respect to Myers' pre-1977 practice before the Public Service Commission. No one suggests that his representation of clients at the Commission before the amendment became effective has breached the public trust.[24] The question posed here, although cast by the parties in terms of the amendment's "retroactivity" and "prospectivity,"[25] is whether the application of Section 8(e) after its adoption impermissibly impairs, during the unexpired portion of Myers' four-year elective term, any of the rights, duties, or privileges appertaining to or dependent upon his public office. Five Florida decisions are said to bear on this question, but three of them are readily distinguishable.

23. In its entirety, Article II, Section 8(e), reads:

> "No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law."

24. The retroactive application of a constitutional amendment to pre-adoption conduct was summarily rejected in Baillie v. Town of Medley, 262 So.2d 693, 697 (Fla. 3DCA 1972), appeal dismissed, 279 So.2d 881 (Fla. 1973).

25. The labels "retroactive" and "prospective" do not aid our analysis.

"In dealing with the problem of retroactivity, it is extremely difficult to establish definite criteria upon which court decisions can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies, but what is reasonable and what is unreasonable is difficult to state in advance of actual decisions.' . . . [T]he method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather it is the method of intelligently balancing and discriminating between reasons for and against.' It is misleading to use the terms 'retrospective' and 'retroactive,' as has sometimes been done, to mean that the act so labeled is unconstitutional, since the question of validity rests on further subtle judgments concerning the fairness or unfairness of applying the new statutory rule to affect interests which accrued out of events which transpired and under circumstances which obtained when a different prior rule of law was in force. . . .

> One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not be defeated. There is evidence that results achieved through application of judicial instinct, manifested in the pattern of decisions on retroactivity problems, are perhaps best explainable in terms of this fundamental principle of justice." 2 Sands, Sutherland Statutory Construction Sec. 41.05, pp. 259-61 (4th ed. 1973).

If there is an appropriate characterization, Florida case law seems to describe the application of a constitutional amendment to conduct following its effective date as prospective in nature. See State ex rel. Judicial Qualifications Commission v. Rose, 286 So.2d 562, 563 (Fla. 1973). And see Department of Health & Rehabilitative Services v. Harrell, 258 So.2d 340, 344 (Fla. 1DCA 1972), cert. discharged, 272 So.2d 151 (Fla. 1973), using the same term in the context of conduct following a statutory change.

In State ex rel. Judicial Qualifications Commission v. Rose, 286 So.2d 562 (Fla. 1973), the Court refused to apply to an incumbent judge a constitutional amendment creating a mandatory retirement age which he had passed at the time the amendment became effective. The Rose decision, however, is not really helpful here. There the Court was obliged to reconcile two competing provisions of the newly adopted constitution, one elevating Judge Rose to the status of a circuit judge as of January 1, 1973, and the other prohibiting judicial service by persons who had attained his then age. The Court reconciled these two provisions to prevent the ridiculous result of "elevating" a judge to a position he was instantly ineligible to occupy.[26] Obviously the problem there has no parallel here.

In Johnson v. Trader, 52 So.2d 333 (Fla. 1951), the Court refused to apply a city ordinance enacted to prohibit civil service employees from engaging in a liquor business to a Pensacola policeman who owned a liquor enterprise, without a reasonable post-adoption period for compliance. In Johnson, of course, the Court was forced to resolve a practical dilemma posed by the precipitous enforcement of the municipality's reasonable regulation governing the conduct of civil service employees. In so doing, the Court fashioned an equitable resolution for the parties grounded on the factual peculiarities of the manner in which the city had handled its transactions with officer Johnson, and on the need for concern with his accrued pension benefits.[27] No similar due process concern or vested property right affects Myers' situation.

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26. 286 So.2d at 563.

27. 52 So.2d at 336-37.

In Hall v. Strickland, 170 So.2d 827 (Fla. 1964), the Court upheld a Dade County charter amendment which terminated the offices of certain incumbent judges whose terms had not expired. In Hall the Court was confronted with two questions: whether a constitutional ban against shortening the term of an incumbent judge was applicable at all to a court created by municipal ordinance, and whether the municipality's particular court was abolished or its incumbent judges removed. By deciding that the constitutional prohibition did not apply at all because of the particular court involved, and that the court was abolished rather than its judges removed, the Court avoided issues (like the one before us) relative to the abridgment of an incumbent officeholder's term.

More akin to the present situation are Holley v. Adams, 238 So.2d 401 (Fla. 1970), and State ex rel. Reynolds v. Roan, 213 So.2d 425 (Fla. 1968). In Reynolds the Court refused to allow a school board to oust its appointed superintendent — an attempt grounded on a constitutional amendment directing that school board superintendents shall serve at the pleasure of their appointing boards — when the incumbent superintendent had received a pre-amendment board appointment for a fixed term extending beyond the amendment's effective date. The Court's opinion discussed to some extent whether superintendent Reynolds' appointed term was definite, and thereby continuable to the end of its pre-amendment contract duration, or indefinite, and thereby subject to the newly created termination authority. The Court's decision hinged, however, on an absence of express language in

the constitutional amendment directing its application to existing contracts.[28]

> "[A]n intention to apply the shortened term of an office, or the changed qualifications thereof, to an incumbent, resulting in his ouster from the office before the end of his term, must be clearly expressed in the statute or constitutional amendment making the change before it will be given that effect."[29]

In Holley, by contrast, the Court did apply a newly-enacted statute to incumbent officeholders—forcing a direct curtailment of the term of office—but nowhere identified the presence of an unambiguous directive in the statute to the effect that it should apply to incumbents. Apparently, the Court there approached the applicability problem from another perspective. By first concluding that the so-called "resign-to-run" statute did not affect the qualifications of office[30] or shorten by *its* operation the term of office,[31] the Court eliminated any possible reasons that the statute should not apply to

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28. Both the Rose and Reynolds decisions express the view that a constitutional provision *can* operate to eliminate an office or a right, provided the amendment unambiguously expresses that intention. The Hall decision illustrates office abolition.

29. 213 So.2d at 428.

30. See Holley, 238 So.2d at 405-06, as to the distinction between the eligibility for office and the qualifications of office.

31. "[T]he reduction of the term, if any, is caused solely by the act of the office holder in abandoning the office which he presently holds." 238 So.2d at 407.

incumbents. By this approach the need to consider an expression of intent in the statute became unnecessary, since the impermissible feature of statutory or constitutional change—an effective "ouster"—was not present in the enactment.

Whether we approach the applicability of Section 8(e) from the perspective of Reynolds or Holley, the conclusion is the same—Section 8(e) should *not* be considered applicable to persons in office on its effective date.[32]

A Reynolds approach would assume for the purpose of discussion an effective ouster by the constitutional amendment and direct our attention to whether the amendment on its face expresses an intention that it be applied to those in office. If not, the amendment would not be so applied. There can be no disagreement that Section 8(e) on its face, or even in conjunction with other provisions of the Sunshine Amendment, does not express a clear and unequivocal intention to apply its strictures to existing officeholders.[33] Compare the expressions of intended application in the provisions construed in Hall v. Strickland, 170 So.2d 827 (Fla. 1964), and in Klein v. Schulz, 87 So.2d 406 (Fla. 1956). Under a Reynolds approach, then, even assuming that Section 8(e) affects the qualifications of office, the absence of

32. We express no view on the applicability of a constitutional or statutory change to persons who assume office simultaneously with the effective date of the change.

33. Indeed, the last sentence of Section 8(e) speaks prospectively of action the legislature may take to expand that provision's coverage to other governmental personnel.

clear language applying it to incumbents prevents its applicability to Myers.

A Holley approach focuses attention directly on the question assumed under a Reynolds approach—whether the constitutional change has abolished the office, changed the qualifications of office, or imposed new and onerous requirements on some or all of the incumbents who desire to continue in office.[34] The resign-to-run law considered in Holley led the Court to conclude that neither an ouster nor an impermissible burden on officeholding was imposed.[35] The same cannot be said of Section 8(e). To apply newly-created professional limitations on a part-time Florida legislator in the midst of his term of office obviously defeats expectations honestly arrived at when the office was initially sought.[36] The office itself is not abrogated or its duties altered, of course, but the privileges of officeholding are no less impaired by curtailing non-legislative employment opportunities than they would be if the office was made full-time and outside employment prohibited altogether.[37] The abridgement in either case is tantamount to changing the qualifications of office. There

34. New and onerous requirements for officeholding may be considered the equivalent of an ouster. See 238 So.2d at 406-07.

35. "[The resign-to-run statute] is not a burden imposed upon the office of circuit judge presently held by Holley. His term of office as circuit judge remains as before and this right is affected only by the voluntary act of the incumbent in office." 238 So.2d at 406.

36. See Sands, note 25 above.

37. See, for example, Art. V, Sec. 13, Fla. Const., prohibiting certain outside employment for full-time judges.

was absolutely no employment limitation when the term of office was sought.[38]

We hold, therefore, that Section 8(e) does not apply to affected officials—legislators and statewide elected officers—who held office on its effective date.[39] Myers, therefore, is not barred from practicing before the Public Service Commission for compensation on behalf of others during his senatorial term which began prior to January 4, 1977. The order of the Public Service Commission is quashed.

It is so ordered. (Adkins, Boyd, Overton, and Hatchett, JJ., Concur.)

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38. Not every statutory or constitutional impairment in the expectations of in the status of officeholders, either in their official or private capacity, will operate only as to future officeholders. This case does not present an occasion to announce other circumstances in which an impairment would be considered tantamount to an ouster, to use the Reynolds phraseology. Wherever a line may ultimately be drawn to separate permissible impairment from that which is impermissible, it is clear that this constitutional change so substantially abrogates Myers' status as a part-time legislator and as a member of The Florida Bar that it would fall well outside the established boundary.

39. The inapplicability of the "after term" ban of Section 8(e) to persons in office on its effective date rests on the same policy considerations as the "during term" ban. The joinder of these prohibitions in the same constitutional paragraph, designed as we have indicated to prevent conflicts of private and public interests, quite plainly stems from the same ethical considerations and requires parallel treatment. The Standards and Conduct Committee of the Florida House of Representatives reached this same conclusion in an opinion concerning the applicability of the "after term" ban to House members in office on its effective date. Opin. No. 39, H.R.J., Reg. Sess. 888 (1978).

* * *

Half of Judges In PB County Worth $100,000

By MARTHA MUSGROVE

TALLAHASSEE — Half the judges in Palm Beach County are worth more than $100,000 and one — retiring Circuit Judge James R. Knott — comes close to being a millionaire, according to recently filed financial disclosures.

Knott, the son of former state treasurer W. V. Knott, listed a net worth of $978,645 mostly in inherited land as previously reported.

Three local judges listed net worths greater than $200,000: former state representative and new County Judge David C. Clark with $286,586, former state senator and new Circuit Judge Thomas H. Johnson with $281,000 and County Judge James Carlisle at $228,000, who inherited valuable lakefront land from his father, a prominent local physician.

Clark also listed an inheritance valued at $125,000 among his assets, plus $85,000 worth of stock in K-Mart and a $60,000 home. He said he also owns $8,000 in "miscellaneous stocks" and is owed $17,000 in referral fees stemming from his former law practice. His sole liabilities were a home mortgage loan, car loan, and $5,000 in "miscellaneous debts."

Johnson listed extensive real estate holdings, including a $75,000 home, property along Military Trail, in Port St. Lucie and North Carolina. He said he owns 3.5 shares of Woods Mountain Properties Inc. valued at $100,000, 10 percent of the stock in Stuart 80 Corp. valued at $24,000 and from which he earned $17,725 in 1976, and 250 shares of common stock in Daytona General Hospital, valued at $2,000. He has $23,916 coming from his former law practice.

Johnson has outstanding mortgages or loans from the Flagship Bank of Jacksonville, First National Bank of Riviera Beach, the Flagler National Bank of Palm Beach, the Central Bank of Palm Beach County, Community Federal Savings and Loan and Clyde Federal Savings and Loan.

Carlisle reported his chief asset as $100,000 in property at 1217 N. Flagler Drive, $50,000 in rental property and a $50,000 residence. He also reported $17,000 worth of stocks including 45 shares in the First Prudential Bank. Carlisle was among the judges filing copies of his 1976 income tax returns which revealed he took a $3,395 tax loss on rental properties which grossed $12 [illegible].

Circuit Court Judge Emery J. Newell said his net worth is $120,[illegible], which includes a $60,000 residence, 17 acres in Martin County worth $51,000 and 250 shares of Barnett Banks of Florida valued at $5,[illegible].

Listing his net worth at $100,[illegible] Circuit Court Judge John B. Beranek valued his residence at $60,000, a rental residence on Desota Road at $16,000, lake property in Gainesville at $10,000 and investments in Martin County at $5,000. He said he owns $18,651 in stock, including American Can, Gulf Oil, Morrison, Lehman Corp. and T. Rowe Price.

Probate division Circuit Court Judge Paul Douglas put his net worth at $112,000 including his $65,000 condominium residence, two cars and a 1973 Dodge Motor Home valued at $10,000. He has small amounts of stock in the Prudential Bank, Texaco, Tucson Gas and Electric, Burnup and Sims and W. T. Grant. He valued the Grant stock at zero, the firm declared bankruptcy a few years ago.

Among the wealthiest of the judges were County Judges Don T. Adams who listed a net worth of $156,500, C. Michael Shalloway $168,[illegible].18, and Howard H. Harrison Jr. with $104,623.

Adams, who works in the Belle Glade complex, listed extensive rental and agricultural property in the Glades area valued at $204,000. He valued his home at $72,500 and listed an $80,000 equity in Adams and Son. Shalloway cited his $45,000 Lake Worth home, $10,000 in North Carolina property, $25,000 in property along Purdy Lane and $45,000 in mortgages on property he apparently sold. Harrison listed a $200,000 home as his principal asset, a $41,473 tennis club condominium apartment and $25,000 in antiques. He, too, filed his income tax returns showing dividends from a variety of nationally traded stocks, including Gulf and Western.

Circuit Court Judge Lewis Kapner said he is worth $50,000 and owns a mortgaged $100,000 home and $9,000 motor home. Circuit Judge Robert Hewitt listed his net worth at $57,000 comprised chiefly of a $42,100 apartment and $33,163 in the state retirement sytem. Circuit Judge Marvin Mounts, former county solicitor, listed a net worth of $72,121, including a $55,467 home and a $2,000 plant collection. He owns $1,850 worth of stock in the Florida National Bank, other securities valued at $3,000 and has invested $18,000 in the state retirement system.

Circuit Court Judge William C. Williams of Delray Beach said he is worth $68,[illegible], including $48,975 in Georgia acreage, and 250 shares of the Sun First National Bank of Delray Beach. Recently appointed Circuit Judge Carl Harper listed a net worth of $85,533.53 including real estate in Santa Rosa and Escambia counties, and County Judge Daniel T. K. Hurley, recently appointed to the Circuit Court, listed a net worth of $28,[illegible]. Hurley said his major asset is a $26,000 condominium apartment.

County Judge Harold J. Cohen listed a net worth of $21,700 and said his chief asset is a $36,000 condominium apartment and two automobiles.

Chief Judge Thomas E. [illegible] listed a net worth of $130,[illegible], including a $112,000 home, $8,[illegible] in stocks and $9,000 in bonds. The judge also owns a half interest in a [illegible] of Woods Mountain Properties, valued at $5,467 and drives a 1972 Jaguar XKE valued at $5,000.

Circuit Court Judge Timothy P. Poulton listed a net worth of $[illegible], including a $78,000 home, a $78,000 rental residence, and $10,000 in North Carolina acreage, all of which are mortgaged. He, too, took a tax loss on his rentals.

Circuit Court Judge Vaughn J. Rudnick said his net worth is $78,702.00, which includes a $34,000 home, nearly $20,000 in the state retirement system, and two cars. Fellow Circuit Court Judge James R. Stewart Jr. listed a net worth of $10,000 including a home valued at $28,000 and two Datsuns.

Circuit Court Judge Hugh MacMillan listed a net worth of $151,222, including a home valued at $63,682, vacant real estate worth $24,750, and a $22,500 mortgage on property he apparently sold at 1125 Belmont. He said his sole sources of income were his state salary of $36,000 and $5,531 from local developer E. Llwyd Ecclestone Jr.

Legislative Leaders Disclose Finances

Here's a breakdown of the financial disclosure statements filed by the leaders in Florida's Legislature — the presiding officers, their chief lieutenants and the committee chairmen:

Senate

DEMPSEY BARRON
(D., Panama City)

LEW BRANTLEY
(D., Jacksonville)

Net Worth $268,000

W.D. CHILDERS
(D., Pensacola)

Net Worth $225,700

EDGAR DUNN
(D., Daytona Beach)

Net Worth $72,251

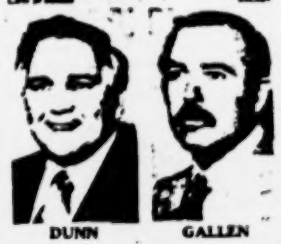
TOM GALLEN
(D., Bradenton)

Net Worth $172,900

JACK GORDON
(D., Miami Beach)

MATTOX HAIR
(D., Jacksonville)

Net Worth $61,337



DUNN GALLEN

Countians Disclose Finances

Some Are Rich, Others in Debt

By MARTHA MUSGROVE

TALLAHASSEE — Palm Beach County has a million-dollar judge and a brash young $7,- county commissioner still paying back the money he spent for a college education.

The judge is Circuit Judge James R. Knott, who claimed a net worth of $975,445 including more than half a million in land, much of it homestead, and stocks or bonds in 17 corporations. The county commissioner is Dennis Koehler, who claimed a net worth of $7,315.- 65, based mostly on a mortgaged apartment, and who still owes George Washington Uni- $3,697.32 in student loans.

Colorful County Property Appraiser David Reid, who spurned the Ethics Commission forms to file a sworn Federal Reserve Bank statement, listed an Atlantic home he owned at a "present market value" of $160,- 000 and an "assessed value" of $51,000.

Knott, Koehler and Reid were three of nearly 40 local officials required to file the first public statements of financial disclosure who beat yesterday's deadline. Scores of other officials missed the deadline, filed incomplete forms in the wrong office, or were temporarily "lost" in the last minute crush and shuffle of paper in the secretary of state's elections division.

"This is worse than campaign reports," cracked one clerk.

Local officials whose reports were not immediately available included Circuit Court Clerk John B. Dunkle, County Commissioners Lake Lytal and Bill Medlen, Reps. Tom Lewis (R-North Palm Beach) and Bill James (R-Delray Beach) and Sens. Phil Lewis (D-West Palm Beach), Jim Scott (R-Fort Lauderdale), Jon Thomas (D-Fort Lauderdale) and George Williamson (R-Fort Lauderdale).

Only Sen. Phil Lewis is among those who have filed suit in federal court challenging the disclosure requirements. Lewis told reporters last week he had filed a report in trust with an attorney, pending the outcome of litigation.

Federal and state courts have refused to restrain the Ethics Commission from acting against Sarasota County officials who also have challenged the provisions. The refusal forced compliance by those officials subject to removal by Gov. Reuben Askew, who

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Disclosure

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drafted and pushed adoption of the amendment. But only the legislature itself can vote removal of senators or representatives who fail to file the sworn statements of net worth identifying assets and liabilities in excess of $1,000.

The county's "wealthiest" officials included Tax Collector Allen C. Clark who reported a net worth of $[illegible], Elections Supervisor Jacqueline Winchester reporting $[illegible], and Sen. Harry A. Johnston, (D-West Palm Beach), reporting $[illegible].

Clark said his only source of income was his salary of $[illegible] and U.S. Air Force pension of $[illegible]. He also said he owned a proprietary interest in Wacne Investment Corp. valued at $[illegible], $[illegible] in real estate and undefined personal property valued at $[illegible]. He listed mortgage and loans owed to the Bank of Palm Beach & Trust Co. and Home Federal Savings and Loan Association.

Mrs. Winchester listed her $[illegible] home, and extensive real estate holdings including part of a mortgage on land sold to Le Chalet in Boynton Beach, and said she co-signed a note with her husband for an $[illegible] apartment in Gemini Club. She too listed stocks in nationally traded companies and U.S. Maritime bonds.

Johnston included his home, Loxahatchee River acreage, timberland in Georgia, and stock in Rinker Materials Corp., the Atlantic National and Jupiter-Tequesta National Banks. He reported he has a 40 percent personal liability on a $[illegible] promissory note owed by his law firm.

Reps. William J. Taylor (D-Tequesta) and Reid Moore (R-Palm Beach) were among lawmakers listing their worth at more than $[illegible]. Taylor listed his at $[illegible], including a $[illegible] home, stock in a funeral home and real estate corporation in West Hartford, Conn., and the Village Funeral Home in Tequesta. Taylor also said he owned stock in the Jupiter and Tequesta National Bank and Osprey Cattle Partnership. Taylor was one of those filing federal income tax returns and he reported a loss in the cattle business. Even so, his income totaled $[illegible], of which $[illegible] was taxable. He paid $[illegible] in taxes.

Moore listed his $[illegible] Palm Beach home among his assets, along with $7,000 in private club memberships and $[illegible] in fees owed to him for his services. Major clients of his law firm included the American Red Cross, the Catholic Church, and Northwestern University. His net worth totaled $[illegible].

Appraiser Reid listed a net worth of $[illegible], including a 1976 Cadillac, a $[illegible] airplane and a half interest in the $[illegible] Atlantis house. He said he owed $[illegible] in mortgage notes but did not identify any banks involved. He reported he earned $[illegible] teaching for the I.A.A.O., an organization of appraisers. He also indicated he is attempting to sell his vacation home in Mississippi, which he rented out during 1976. He listed $[illegible] in Christmas gifts from employees.

County Commissioner Bill Bailey set his net worth at $[illegible], including as assets a $[illegible] home and $[illegible] in automobiles. He has mortgages and outstanding loans payable to Fidelity Federal, the Central Bank of Palm Beach and Fred L. Martin. Major sources of income during 1976 included $[illegible] in commissions paid by Gold and Western Food products to Vero Beach, $[illegible] by Woody Resmondo of Lyo, Ga., $[illegible] by Noah Resmondo of Vidalia, Ga., $[illegible] by E. [illegible] McCabe in Belle Glade, and $[illegible] by Phil Chilli[illegible] West Palm Beach.

Commissioner Peggy Evatt claimed a net worth [illegible] $[illegible] including a $[illegible] mortgaged home, 40 shares of AT&T, savings and two cars.

Public Defender Richard Jorandby listed his [illegible] worth at $[illegible], with his rural estate home valued [illegible] $[illegible] mortgaged for $[illegible]. He said he owned [illegible] acres in Jupiter and nearly six acres in Palm Beach Little Ranches, also mortgaged.

Perhaps by contrast State Atty. David Bludworth [illegible] a net worth of $[illegible]. That included a $[illegible] home, and real estate holdings in Loxahatchee, Royal Palm Beach Colony, Okeechobee and Monroe counties, and Black Mountain, N.C.; all were mortgaged, reducing his $[illegible] income to a taxable income of $[illegible] on which he paid $7,[illegible] in taxes.

Rep. Don Hazelton (D-West Palm Beach), gearing up for a statewide campaign for insurance commissioner, listed his net worth at $[illegible] including a $[illegible] home in Tallahassee, three automobiles and $[illegible] worth of camera equipment.

Sen. Dan Childers (D-West Palm Beach), also eying a state race, listed his net worth at $[illegible] and his principal source of income as Home Insurance Co. of Coral Gables. He said he owned $[illegible] in real estate and $[illegible] in personal property. He said he owed $7,[illegible] to banks and $14,000 in mortgages. Other assets included acreage in Ozark, Ala., 100 shares of Forest Hill Bank Bancshares and a 3.9 percent share LMT partnership venture in Atlanta, Ga. He said he'd accepted a weekend at Walt Disney World, valued at $[illegible], a $[illegible] hunting trip with J.R. Spratt in Clewiston, and attended the expense-paid Governors Conference on Tourism.

County delegation Chairman Rep. Edward J. Healey (D-West Palm Beach) listed his net worth at $[illegible], including a $[illegible] home, $[illegible] in pension funds and a lot at 1614 Hollywood Place. His principal source was life insurance commissions paid by Mutual of New York.

Rep. John Considine (D-West Palm Beach) listed his net worth at $[illegible], including a $[illegible] residence and a half interest in 2.5 acres of land in Gilchrist Company. He, too, had an outstanding student loan of $2,[illegible], and listed small unsecured notes to Central Bank, Flagler National Bank and Paul Mann, as well as home mortgage with Fidelity Federal Savings and Loan. Listed as sources of income were Nicholas Wellman of Riviera Beach, a Riviera Beach public relations firm, Stirling, Hussey, Cummings, and Associates, and Walter E. Heller Co. Southeast of Miami. Listed as gifts were accommodations at the Beau Rivage Hotel for a hearing on generic drugs in Miami Beach, and the Dade County legislative weekend.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-844

KENNETH A. PLANTE, DEMPSEY J. BARRON, PHILIP D. LEWIS, JACK D. GORDON and JON C. THOMAS,

Petitioners,

vs.

LARRY GONZALEZ, as Executive Director of the Florida Commission on Ethics; BRUCE SMATHERS, as Secretary of State of Florida; THE FLORIDA COMMISSION ON ETHICS; and REUBIN O'D. ASKEW, as Governor of the State of Florida,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

The question presented by Petitioner assumes the existence of that which is in issue. Respondent would restate the questions presented as follows:

1. Whether any fundamental right of privacy under the Fourteenth Amendment exists in favor of elected state Senators against public disclosure of commercial, financial matters, especially where such

elected state officers concede that no such right of privacy exists to preclude the initial collection of such information.

2. If the answer to question one is in the affirmative, whether such public disclosure must be tested by a "balancing" test against conceded "vast concerns" of the state in deterring governmental corruption, or whether a "least restrictive means" test must be applied.

3. If a "least restrictive means" test must be applied, was the Fifth Circuit Court of Appeals correct in its conclusion that public disclosure to the electorate (rather than to a secret commission, hidden from the voters) is the only means to provide this important information to the voting public.

REASONS FOR DENYING THE WRIT

The bases for granting a writ of certiorari pursuant to Rule 19, Supreme Court Rules, are not present in this case. The decision below is not in conflict with a decision of another court of appeals on the same subject matter, nor is it in conflict with decisions of this Court. As will be shown, the decision is in accord with the nearly unanimous line of decisions from ten states and one other federal court of appeals. For these reasons, the issue of federal law in this case is presently being applied correctly and uniformly and does not require further elucidation by the Court. Moreover, to accept Petitioners' invitation to create new federal privacy rights where none now

exist would place the federal judiciary in the untenable position of acting as censor over the daily operation of open meetings laws and public records laws of every state, county, municipality, school board, special taxing district, or other local entity in this country. Such an extension of the right of privacy from the intimacies of marriage and procreation to financial transactions in the marketplace has no basis in the Constitution.

I.

THIS CASE DOES NOT PRESENT A FEDERAL QUESTION OF GREAT SIGNIFICANCE.

The questions presented herein were correctly decided by the Courts below in lengthy, thoughtful opinions, the decisions of most states are uniformly in accord, there is no "growing conflict" among state decisions, the prior decisions of this Court have obviously provided clear guidance on the issue, and a decision on the issues herein will not settle the question in the 40 other states which have uniquely varied disclosure laws. For these reasons, this case does not present a federal question of great significance.

Petitioners would have the Court believe that fifteen (the total is actually fourteen[1]) state courts have ruled upon state financial disclosure laws,

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[1]The total actually is fourteen states. The Alabama case cited by Petitioners, Comer v. City of Mobile, 337 So.2d 742 (1976) did not address disclosure issues.

and that five have refused to sustain such laws on grounds relevant to this petition. In fact, ten[2] state courts have addressed and rejected claims of "right of privacy" based upon the federal constitution. Of the five other cases cited by Petitioners as having "refused to sustain their particular state's disclosure laws," only two did so on federal privacy grounds, and these decisions are premised upon extremely flimsy analysis of the issue.

The first of the two decisions, City of Carmel-by-the-Sea v. Young, 466 P.2d 225 (Calif. 1970) was the nation's first case on this subject, cites no case from this Court for its ultimate conclusion that a federal right of privacy exists in financial matters, and was subsequently severely undermined by County of Nevada v. MacMillen, 522 P.2d 1345 (Calif. 1974), and Hays v. Wood, 78 Cal. Supp.3d 352, 144 Cal.

[2]Eight such states are collected in footnote 24, Petitioners' Brief. To these must be added: Florida: Goldtrap v. Askew, 334 So.2d 20 (1976). Wisconsin In re Kading, 70 Wis.2d 508, 235 N.W.2d 409 (1975). To California must also be added the very important case of County of Nevada v. MacMillen, 522 P.2d 1345 (1974). Moreover, several of the decisions collected in footnote 24 of Petitioners' Brief have subsequently been affirmed per curiam by the highest courts of New Jersey and New York: New Jersey: Lehrhaupt v. Flynn, 383 A.2d 428 (1978); Kenny v. Byrne, 383 A.2d 428 (1978). New York: Hunter v. City of New York, 44 N.Y.2d 708, 405 N.Y. S.2d 455 (1978).

Rptr. 456 (1978). City of Carmel has clearly been laid to rest in California. The only other decision arguably based upon a purported federal right of privacy in financial matters is Labor's Educ. and Pol. Club v. Danforth, 561 S.W.2d 339 (Mo. 1978), which is even more remarkable for its failure to cite any federal cases on the subject (561 S.W.2d at 349-50), and concerned only candidate financial disclosure.[3]

The other three cases cited by Petitioners as having failed to sustain disclosure laws did so upon grounds wholly irrelevant to this petition.[4]

[3]The case should be compared with Chamberlin v. Missouri Elections Commission, 540 S.W.2d 876 (Mo. 1976) where the same Missouri Supreme Court considered the same statutory provision and rejected challenges based upon "overbreadth," equal protection, and the attorney-client privilege.

[4]Alaska: Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469 (Alas. 1977) was decided on state constitutional grounds; the Alaska constitution has an explicit "right of privacy." Moreover, the case ruled only upon disclosure of contraceptive, venereal disease, and psychiatric patients of a physician. The claim of privacy was more that of the patient than the physician. Moreover, unlike Florida's $1000 threshold, the income threshold was a mere $100. The court indicated that if such patients are excluded, other patients' names may be compulsorily disclosed. Michigan: Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich.

In sum, fifteen judicial decisions in ten states have correctly followed the decisions of this Court to reject challenges to their unique financial disclosure laws based upon an asserted federal right of privacy in commercial and financial matters. The two state judicial decisions to the contrary are aberrations, and can hardly be said to conflict with decisions of this Court since neither decision rests its conclusion upon a ruling (dicta or otherwise) from this Court.

On five prior occasions this Court has been presented with similar claims to financial privacy with respect to public disclosure requirements. In three cases, the Court dismissed the appeal for lack of a substantial federal question. Montgomery County v. Walsh, 274 Md. 489, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306 (1976); Fritz v. Gorton, 83 Wash. 275, 517 P.2d 911, appeal dismissed, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974); Stein v. Howlett, 52 Ill.2d 570, 289 N.E.2d 409 (1972), appeal dismissed, 412

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[4]Continued from previous page:

465, 242 N.W.2d 3 (1976) was decided on state grounds, overbreadth and equal protection under the state constitution. Indeed the court ruled that Michigan's financial disclosure did not violate a federal privacy right. 242 N.W.2d at 18-21. Nevada: Dunphy v. Sheehan, 549 P.2d 332 (Nev. 1976) concerned a criminal statute and was decided on vagueness grounds. The case contains no ruling upon the privacy issue. 549 P.2d at 336.

U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973). Certiorari was denied in Illinois State Employees Ass'n. v. Walker, 315 N. E.2d 9 (Ill. 1974), cert. den. sub nom. Troopers Lodge No. 41, Fraternal Order of Police v. Walker, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656 (1974), and O'Brien v. DiGrazia, 544 F.2d 543, 545-46 (1st Cir. 1976), cert. den. sub nom. O'Brien v. Jordan, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).

Summary dismissals for lack of a substantial federal question at least tell us that the underlying principles of law are settled.

> Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Mandel v. Bradley, 432 U.S. 173, 176, 53 L.Ed.2d 199, 205, 97 S.Ct. 2238 (1977).

This petition does not, therefore, present a federal question of great significance. With virtual unanimity the courts of this nation have understood and correctly applied these settled principles. Petitioners' invitation that a new fundamental federal cause of action respecting commercial matters be shaped from the fuzzy fringes of penumbras, statements in dissenting and concurring opinions, and obiter dicta, should be declined by the Court.

If there were a fundamental right of privacy in non-disclosure of financial matters by elected public officials, the decisions would have been a great deal less uniform in sustaining public disclosure statutes because the disclosure statutes vary so widely from state to state.[5]

Typically disclosure statutes apply only to executive and legislative officials and not to judges due to problems with separation of powers.[6] Thresholds vary, secondary source disclosure rules differ, some require disclosure of interests of family members, some require dollar amounts, while others only values by categories, and the ranges of public officials and employees required to disclose are as diverse as are the 50 states. Each, it must be assumed, is a rational political response to the felt needs of the particular jurisdiction.

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[5]Petitioners concede as much by their citation to the multitude of diverse disclosure procedures in the various states (pp. 24-25, 28-30, Petitioners' Brief) and their statement that "[t]he contextural variations among the statutes and the differing ground for the decisions defy any inventory analysis." (e.s., p. 32, Petitioners' Brief.)

[6]The Florida disclosure statute, §112.3145, Fla. Stat. (1975) was ruled not applicable to the judicial branch due to separation of powers. In re the Florida Bar, 316 So.2d 45 (Fla. 1975). See also generally Dunphy v. Sheehan, 549 P.2d 332, 336 (Nev. 1976); In re Kading, 235 S.W.2d 409, 416 and 419 (Wisc. 1975).

The disclosure requirement in the case at bar applies only to "elected constitutional officers" and was adopted by direct citizen initiative as a constitutional amendment in 1976. The vote in favor was overwhelming.[7]

This deeply-felt, grass roots expression by the people of Florida must be viewed as the unique efforts of the citizens of one state to reshape their social compact with those who are given positions of public trust.[8] The adoption by

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[7]The vote was 1,765,625 to 461,940. By comparison, in the 1978 general election the voters of Florida rejected every revision proposed by the Constitutional Revision Commission.

[8]As the Fifth Circuit pointed out, Florida's political history in recent years has given the citizens of Florida some reason for concern:

> Florida's Controller, Treasurer, and Superintendent of Education were indicted for selling their influence. A legislative committee recommended that one state supreme court justice be impeached for similar activities. A second justice resigned under fire. A third supreme court justice was reprimanded by the state body supervising judicial conduct. N.Y. Times, April 27, 1975, at 35, col. 1. In 1976 U. S. Representative Robert L. F. Sikes was reprimanded by the House of Representatives because as

initiative of the Sunshine Amendment is also consistent with Florida's somewhat unique political belief in the wisdom of government accountability through very broad open meetings[9] and public records[10] laws.

At issue in this case, therefore, is public disclosure of financial matters by five elected members of the Florida legislature. The myth of the "part-time" legislator, who leaves the store or farm for a sixty day stint of volunteer duty in Tallahassee, is as wishful as the federal right of commercial privacy which Petitioners seek herein to have established. The five State Senators include among their alleged part-time ranks the current Sentate President, formerly Chairman of the Senate Appropriations Committee, the former Senate President and Chairman of the Senate Governmental Operations Committee, currently the Chairman of the Senate Rules and Calendar Committee, and the current

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[8]Continued from previous page:

Chairman of the House Appropriations subcommittee on military construction he had helped pass legislation and secured government decisions from which he benefited financially. United States Senator Edward Gurney was acquitted of federal charges stemming from alleged influence peddling. N.Y. Times, July 12, 1974, at 10, col. 1; October 28, 1976, at 19, col. 1. 575 F.2d at 1122 n. 3.

[9]Section 286.011, Fla. Stat. (1977), the Government in the Sunshine Law.

[10]Ch. 119, Fla. Stat. (1977).

or former chairmen of the Senate Committees on Ways and Means, Finance, Taxation and Claims, and Health and Rehabilitative Services. Collectively they exercise an enormous portion of the public trust committed to the legislative branch in Florida, and do so throughout the entire year.

Against the essentially political choice made by the people of Florida (and the diverse legislative choices made by other states) as to what governmentally collected information ought to be made public, this petition invites the Court to create a new fundamental constitutional right of privacy in the marketplace, a right to be fashioned from the shadowy, shifting never-never land of the penumbras asserted to be cast by more explicit provisions in the Bill of Rights. Once such a right is fashioned, Petitioners then ask that it cause a "least restrictive means" test to be applied. In short, Petitioners would have the federal courts become daily censors as to what governmentally acquired data ought to be publically disseminated.

While the Court has not explicitly ruled on the question from this side of the controversy, it has made it clear that the decision not to disseminate governmentally collected information should be left to the political process.[11] In Houchins v. KQED, Inc., _____U.S._____, 57 L.Ed.2d

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[11]The flip side of this lawsuit would be a suit by the press to force public disclosure, had the political choice in Florida been (as Petitioners suggest) to require confidential disclosure to a governmental agency.

553, 98 S.Ct. _____(1978), Mr. Chief Justice Burger wrote:

> There is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient."
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> * * *
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> The First Amendment is "neither a Freedom of Information Act nor an Official Secrets Act." Stewart, Or of the Press, 26 Hast LJ 631, 636 (1975). The guarantee of "freedom of speech" and "of the press" only "establishes the contest [for information] not its resolution . . . . For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American Society." Ibid.

57 L.Ed.2d at 564-65. Mr. Justice Stewart concurred, stating

> [f]orces and factors <u>other than the Constitution</u> must determine what government held data are to be made available to the public. (e.s.)

57 L.Ed.2d at 566, fn.

The case at bar represents a classic example of political choice through citizen initiative. By amendment of their organic law, the people of Florida have chosen that their state government should be more accountable by providing additional information to the voters. Whether to tip the scales back again is not a federal question of great importance, but a political question unique to one state. Mr. Justice Rehnquist made this point in 23 <u>Kan.L.Rev.</u> 1 (1974):

> In concluding this discussion let me observe that I have tried to suggest several shortcomings that appear to me to characterize some of the current discussions about claims to increased privacy. The first shortcoming is at least in part a definitional one - widely divergent claims, which upon analysis have very little in common with one another, are lumped under the umbrella of "privacy." . . . The second shortcoming seems to me to be a failure to recognize the extent to which many claims of privacy, if accepted, would be established <u>at the expense of other competing values</u>, <u>such as the interest in effective law enforcement, the interest in a well informed citizenry</u>, and the interest in efficient expenditure of public funds.
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> * * *
>
> I have, finally, tried to point out why it may be thought preferable

> that those who champion the right Justice Brandeis described as "the right to be let alone" direct their attack to the repeal of existing laws on the books or to opposition to enactment of additional laws. Under this approach the issue may be joined and the conflicts resolved without any unintended sacrifice of other values. (e.s.)

The appropriate balance to be struck between public accountability and the privacy of public officials is essentially a legislative decision:

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution . . . . Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority. (e.s.)

Mr. Justice White, dissenting in Moore v. City of East Cleveland, 431 U.S. 494, 543-44, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977).

Expansion of a penumbra right of privacy to the marketplace of financial activity would place the federal judiciary in the role of censor of the daily operation of public records and open meetings laws at every level of government, from Washington, D.C., to the smallest

town hall. The decision whether governmentally acquired information concerning the federal census, taxation, occupational licensing, unemployment compensation, health and safety regulation, zoning, operation of motor vehicles, public housing, parole, arrests, or the like should be disclosed through public records or open meetings is not and ought not be a federal question of great importance.[12]

Respondents therefore would urge the Court to decline Petitioners' invitation and leave intact the well-reasoned opinions of the trial court and court of appeals herein, which are consistent with the nearly unanimous decisions of other jurisdictions that have closely considered the question.

[12]For example, two cases now pending in the Florida Supreme Court assert a right of privacy against the operation of Florida's public records law. One involves whether tenants in public housing are subjected to unconstitutional embarrassment by having tenant records subject to the public records law. Forsberg, et al. v. The Housing Authority of the City of Miami Beach, Case No. 54,623. The second involves the application of the public records law to data collected in an employment search for a new manager of city-owned utility. State ex rel. Schellenberg, et al. v. Byron Harless, Schaffer, Reid and Associates, et al., Case Nos. 54,405 and 54,406.

II.

THE DECISION OF THE COURT OF APPEALS REACHES THE CORRECT RESULT.

A. The Constitution does not provide a right of privacy against public disclosure of financial information with respect to elected state officers.

Petitioners do not contest the "vast concern" of the state to collect financial information from a state legislator. They assert, rather, that once collected the decision whether such information may be made available to the electorate is constrained by a fundamental right of non-disclosure. In this context, the decisions of this Court indicate that such privacy right does not exist.

First, it is clear that publication of financial information does not directly concern or burden certain fundamental familial rights and choices heretofore recognized by the Court as within the "automony" branch of privacy. These matters have been limited by the Court to marriage, procreation, contraception, family relationships and child rearing. Paul v. Davis, 424 U.S. 693, 713, 47 L.Ed.2d 405, 421, 96 S.Ct. 1155 (1976); Paris Adult Theatre v. Slaton, 413 U.S. 49, 65, 37 L.Ed.2d 446, 462, 94 S.Ct. 27 (1973). Financial activity, while at times related to family life, is carried on in the public marketplace, and thus is qualitatively different

from the intimacies of procreation.[13] A line must be drawn somewhere, as the Fifth Circuit pointed out:

> There is no doubt that financial disclosure may affect a family, but the same can be said of any government action.

Plante v. Gonzalez, 575 F.2d 1119, 1131 (5th Cir. 1978). Moreover, in contrast to the "autonomy of choice" cases referenced in Paul v. Davis, financial disclosure does not preclude financial choice:

> Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process. Their effect on financial decisions is more indirect. . . . Our society has long regulated people's finances. Interference with business activity, through licensing, taxing, and direct regulation, is common. All these governmental actions impinge on the ability of the individual to order his financial affairs. They do so directly. The indirect effects caused by financial disclosure pale by comparison. At one time "liberty of contract" was recognized as a major, if not the

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[13] Compare the results in Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971) (marriage) to U.S. v. Kras, 409 U.S. 434, 34 L.Ed.2d 626, 93 S. Ct. 631 (1973) (bankruptcy).

> major, component of the liberty guaranteed by the fourteenth amendment. See, e.g., Allgeyer v. Louisiana, 1897, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832. See generally R. McCloskey, American Conservatism in the Age of Enterprise: 1865, 1910, 72 126 (1951). That is no longer the case. (E.S.)

Plante v. Gonzalez, supra, 575 F.2d at 1130-31.

Lacking a claim to the "autonomy" branch of privacy, Petitioners assert the existence of a fundamental "right to confidentiality" against public disclosure of finances, relying primarily upon Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), Whalen v. Roe, 429 U.S. 589, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977), and Nixon v. Administrator of General Services, 433 U.S. 425, 53 L.Ed.2d 867, 97 S.Ct. 2777 (1977). To support their assertion of the existence of a general right of confidentiality, Petitioners construct an argument from a patchwork of dissents, concurrences, and dicta. The argument does not hang together, however, upon analysis.

Initially, it should be noted that the Court's decisions exhibit a marked reluctance to detect fundamental rights of privacy in the marketplace.[14] In

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[14]Perhaps this is so because of the Court's recognition that the day of judicial supervision of commercial activity in the name of substantive due

California Bankers Assn. v. Shultz, 416 U.S. 21, 39 L.Ed.2d 812, 94 S.Ct. 1494 (1974), the Court reversed a three-judge court ruling in Stark v. Connally, 347 F.Supp. 1242 (N.D. Calif. 1972), which had held that depositors had a Fourth Amendment privacy right in their banking records. The Court concluded that although the bank acted under compulsion of law in maintaining records of the financial transactions of individuals,

> . . . it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.

416 U.S. at 54, 39 L.Ed.2d at 836. California Bankers Assn. did not involve disclosure of the bulk of these records to the government, however, and stands primarily

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[14]Continued from previous page:

process is over:

> In the area of business regulation "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." Bi-Mettalic Co. v. Colorado, 239 U.S. 441, 445 (1915).

New Motor Vehicle Board of California v. Fox, case nos. 77-837 and 77-849, decided December 5, 1978, 47 U.S. L.W. 4017, 4020.

for the lack of a privacy right in the collection of such records. Subsequently, the Court decided United States v. Miller, 425 U.S. 435, 48 L.Ed.2d 71, 96 S.Ct. 1619 (1976), a case like California Bankers Assn. arising under the Bank Secrecy Act. Miller squarely presented the question whether governmental collection of banking records (by compelling banks to keep records) coupled with compelled disclosure to the government implicated Fourth Amendment privacy rights. The court ruled it did not. 425 U.S. at 443, 48 L.Ed.2d at 79.

Miller pointed out that checks and deposit slips

> . . . are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained . . . contain only information voluntarily conveyed to the banks and exposed to their employee in the ordinary course of business.

425 U.S. at 443, 48 L.Ed.2d at 79.

Disclosure of financial transactions required herein by the Sunshine Amendment concern essentially the same kinds of commercial transactions at stake in Miller. Income is generated and assets acquired by means of transactions in public, outside the home. Like the transactions between bank depositor and commercial bank, such financial transactions typically involve many daily arms-length disclosures through public recording, financing and insurance arrangements, advertising, and the like.

Given the quasi-public nature of financial information, the question is whether the constitution gives to public officials a fundamental right of confidentiality in such information. The starting place for analysis is Paul v. Davis, supra. Paul v. Davis ruled that the publication of information collected by the government, even though defamatory per se under state tort law, does not rise to the level of a constitutional infringement of a "liberty" or "property" interest guaranteed against state deprivation without Fourteenth Amendment due process of law. 424 U.S. at 712, 47 L.Ed.2d at 420. More importantly Paul ruled that publication of such information did not implicate a constitutional right of privacy despite the fact that Plaintiff had alleged (and on a motion to dismiss, such allegations were assumed true) that by branding him as an "active shoplifter," his future employment opportunities would be impaired and he would be inhibited from entering commercial establishments for fear of arrest.

Paul v. Davis is the touchstone for understanding the decisions relied upon by Petitioners. Paul v. Davis informs us that publication of information by the government, even though potentially damaging (or even tortious), does not give rise to a federal claim in the absence of a direct impact upon a legal status or an explicit guarantee found elsewhere in the Constitution.[15] As such, Paul v. Davis

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[15]The "injury plus" rule of Paul v. Davis is analytically similar to the test recently adopted by the Court in Rakas v. Illinois, Case No. 77-5781, decided December 5, 1978, 47 U.S.L.W. 4025, for

is the only decision of this Court concerning publication of government information, in contrast to collection of such information.

Paul v. Davis thus explains the meaning of this Court's reference in Buckley v. Valeo, supra, to Mr. Justice Powell's concurring remarks in California Bankers Assn. (that "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs"). Petitioners rely heavily upon this passage as establishing a general right of confidentiality unconnected with any explicit provision of the Constitution. But as Paul v. Davis would require, the reference in Buckley directly concerns explicitly protected fundamental First Amendment freedoms (so-called privacy of belief and association with respect to political campaigns). Since the public disclosures in the case at bar are not concerned with financial transactions directly supportive of speech and expression, Buckley is of little use to Petitioners.[16]

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[15]Continued from previous page:

determining when Fourth Amendment "privacy" applies to unreasonable governmental intrusions. Rakas provides that an individual's subjective expectation of privacy is not enough without society's recognition that that expectation is reasonable. 47 U.S.L.W. 4032 and 4030 n. 12.

[16]Where such disclosure does violate a right secured by the Constitution, the violated right is not any right of privacy but some other right whose

Similarly, Nixon v. Administrator of General Services, supra, did not create a general right to confidentiality, but rather was concerned with disclosures which impacted fundamental rights that had previously gained explicit recognition. The "privacy" of the communications in Nixon gained protection from the inseparable[17] conjunction of rights secured by separation

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[16]Continued from previous page:

> exercise is deterred or hampered by disclosure . . . . For example, "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976) (per curiam). In these areas, the Constitution secures the right of privacy because the right is "indispensable" to some other constitutional right . . . . This limitation of the constitutional right of privacy is the only way to prevent its invasion from becoming a general constitutional tort.

Crain v. Krehbiel, 443 F.Supp. 202, 209 (N.D. Calif. 1978).

[17]As Mr. Justice Rehnquist noted in dissent, these concepts cannot be compartmentalized. 433 U.S. at 545 n. 1, 53 L.Ed.2d at 954-55, n.1.

of powers, Presidential privilege,[18] and the autonomy branch of privacy, which protects intimate communications in a marriage or family context.

The subject matter in Nixon was speech itself, and speech of the most intimate familial nature.[19] At stake in Nixon were the direct, unedited, and candid voice recordings of ". . . extremely private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his

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[18]See United States v. Nixon, 418 U.S. 683, 708, 41 L.Ed.2d 1039, 1063-64, 94 S.Ct. 3090 (1974).

[19]Mr. Chief Justice Burger noted the distinction here between "private papers" such as a "personal diary or family correspondence" and "commercial matters:"

> The Court's refusal to afford constitutional protection to such commercial matters as bank records, California Bankers Assn. v. Shultz, 416 U.S. 21, 39 L.Ed.2d 812, 94 S Ct. 1494 (1974), or drug prescription records, Whalen v. Roe, 429 U.S. 589, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977) only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.
> 433 U.S. at 529, n. 27, 53 L.Ed. at 944 n. 27.

wife's personal files . . . ." (e.s.) 433 U.S. at 459, 53 L.Ed.2d at 901. Nixon is of no applicability here.[20]

The only other case relied upon by Petitioners for a fundamental right of confidentiality in financial matters is Whalen v. Roe, supra. Whalen makes it very clear, however, that the Court therein was only deciding whether collection of data concerning drug usage was permissible. Whalen concludes with the caveat that the Court was not deciding the existence of a fundamentalgeneral right of confidentiality to preclude public disclosure of data collected by the government. 429 U.S. at 605-06, 51 L.Ed.2d at 77. Compare the separate concurrences of Mr. Justice Stewart with Mr. Justice Brennan.

Had Whalen addressed the issue whether there exists a general right of confidentiality, it is submitted that the Court would have concluded that no provision of the Constitution protects such asserted privacy. First, the authority for the so-called "confidentiality" strand of privacy is found in footnote 25 of Whalen. Cited therein is Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478, 72 L.Ed. 944, 48 S.Ct. 564 (1928); Griswold v. Connecticut, 381

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[20]The peculiar facts of the Nixon case, and in particular the bill of attainder aspects(433 U.S. at 468, 53 L.Ed.2d at 907) make the case applicable to a class of one. Moreover, public access was ". . . not now the issue." Mr. Chief Justice Burger, dissenting. 433 U.S. at 524, 53 L.Ed.2d at 941.

U.S. 479, 483, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965); Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969); and the separate dissent and concurrence of Mr. Justice Douglas and Mr. Justice Stewart, respectively, in California Bankers Ass'n. v. Shultz, supra. Yet none of these cases directly ruled upon publication of governmentally collected data. Olmstead, Stanley, and California Bankers Assn. focused primarily upon governmental intrusion and collection of data, and the quote from Griswold (an autonomy case) also related to intrusion and collection of data. Thus, the authority cited for a "confidentiality" strand of privacy is rather slim.

But more important, the issue posed in Whalen (but avoided on Whalen's facts) was the Plaintiff's claim that

> The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. (e.s.)

429 U.S. at 600, 51 L.Ed.2d at 74. This was precisely the same issue addressed and laid to rest in Paul v. Davis, supra. Governmental publication of data which may adversely affect one's reputation,

without a direct connection to an explicit constitutional guarantee, does not implicate fundamental constitutional rights.[21]

In sum, there is no constitutional right of privacy against public disclosure of the financial and commercial information herein with respect to these elected state officers.

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[21] Whalen might have discovered a right of privacy tied to the "autonomy" line of cases since decisions concerning the care of one's body and interest in personal physical health are far closer to procreative intimacies than the financial and commercial matters involved herein. Cf. Estelle v. Gamble, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976). But see Whalen v. Roe, 429 U.S. at 602 n. 29, 51 L.Ed.2d at 75 n. 29, and accompanying text;

> . . . disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.

B. Even if a right of confidentiality exists herein with respect to financial information, the proper test for determining the validity of disclosure is a balancing test, not a "least restrictive means" test.

The Petitioners rely again upon Buckley, Nixon, and Whalen, supra, for their assertion that public disclosure must be measured by a "least restrictive means" test, and again their reliance is misplaced.

As discussed above, Buckley applied the strict test because First Amendment freedom of speech, expression, association, and belief were at stake. Acquisition and expenditure of money for political expression was the issue in Buckley. Disclosure of such financial matters, anchored firmly in the First Amendment, is wholly different from disclosure of general commercial and financial information. Buckley thus does not support a "least restrictive means" test here.

Petitioners' discovery of a "least restrictive means" test in Nixon is also in error. On page 48 of their Brief, Petitioners identify and quote a passage from Nixon as a basis for application of a "least restrictive means" test to a general claim of confidentiality. That passage, however, occurs only in the section in the Nixon decision which discusses recorded communications with respect to the former President's political activities as head of the Republican Party. 433 U.S. at 465-66, 53 L.Ed.2d at 905. Obviously these communications were, in and of themselves, the exercise of speech, belief, and association. Thus, when the Court later

relied upon a "least restrictive means," test, 433 U.S. at 467, 53 L.Ed.2d at 906, it did so not in analysis of a general privacy claim, but in weighing a First Amendment right. This becomes especially apparent by the Court's citation and quote from Buckley.[22]

The Nixon decision seems to apply more of a "balancing" test than a "least restrictive means" test in its analysis of the privacy claim which focused upon Mr. Nixon's intimate communications with his family and his voice-recorded diary. 433 U.S. at 455-65, 53 L.Ed.2d at 899-905. Given Mr. Nixon's status as a public figure and the commingling of intimate familial speech with a mass of clearly public material, the Court concluded that on balance the review of such communications by government archivists was a reasonable means selected by Congress to effect return of those recorded communications which Congress by statute had determined would be returned to Mr. Nixon. 433 U.S. at 465, 53 L.Ed.2d at 905. Thus, upon the particular facts presented, the Court had no occasion to determine whether a "least restrictive means" test was required.

Petitioners' analysis of Whalen is similarly in error. Petitioners say on page 49 of their Brief that Whalen found a "compelling state interest in requiring the recording of the medical data in a

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[22]See also Mr. Chief Justice Burger's dissent, relying upon Buckley. 433 U.S. at 527, 53 L.Ed.2d at 943.

centralized computer bank." On the contrary, Whalen did not use a "compelling state interest" test to determine the constitutionality of data collection. Whalen instead applied the much less exacting rational basis test, and indeed noted that such test today is applied far more cautiously than when Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905) was decided. Whalen's discussion and rejection of the approach in Lochner v. New York makes this very clear. The Court in Whalen wrote:

> State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.

(Footnotes omitted.) 429 U.S. 589, 597, 51 L.Ed.2d 64, 72, 97 S.Ct. 869 (1977). The discussion at footnote 20 is especially pertinent. The Court then concluded that even if the state's experiment in data collection resulted in a "mountain of useless information" (e.s.), the state was to be allowed such experimentation in its efforts to deter and detect drug misuse:

> It follows that the legislature's enactment of the patient identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional. (e.s.)

429 U.S. at 598, 51 L.Ed.2d at 73.

Petitioners then attempt to build upon their error, asserting that Whalen not only applied a "compelling state interest" test to data collection, but also to data publication. At page 51 of their Brief, Petitioners conclude Section II of their argument with the assertion that the Court in Whalen

> . . . has clearly stated that public disclosure as well as recording must meet the test of overwhelming need and the absence of other reasonable alternatives. (e.s.)

If Whalen expressly rejected any need to find a "necessity" for data collection, it would be even more apparent that Whalen does not provide the logic for Petitioners' attempts to have a "least restrictive means" test applied to data publication. In any event, like Nixon, Whalen is limited to its facts and was not an occasion for the Court to have determined whether a "least restrictive means" test must be applied.

Thus, even if some general right of privacy exists in commercial data, it would

be correct for the courts below to have applied a balancing test to the disclosure of such information.[23]

C. The decisions of the Courts below are correct even if a "least restrictive means" test is applied.

It is important to reiterate that the public disclosures required in this case apply to "elected constitutional officers" in Florida, and these Petitioners are elected State Senators. Petitioners are responsible not to the "State" in the abstract, or to any Commission or agency thereof, but to the people. The Sunshine Amendment was proposed by and enacted by the people of Florida, not by their representatives.

Petitioners suggest that secret

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[23]The Fifth Circuit noted that application of a strict scrutiny test to laws requiring disclosure of financial information would have far-reaching effects:

> Subjecting financial disclosure laws to the same scrutiny accorded laws impinging on autonomy rights, such as marriage, contraception, and abortion, would draw into question many common forms of regulation, involving disclosure to the public and disclosure to government bodies.

(Footnote omitted.) Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

disclosure to the Commission on Ethics is the "least restrictive means" to achieve what they concede are compelling state interests in fostering accountable, trustworthy government. Perhaps Petitioners would also suggest that the people deliver their proxies to the Commission on Ethics as well so that there can be a logical marriage of relevant information and the privilege of voting. While that would greatly simplify administration of Florida's next general election of "elected constitutional officers," it is not without its effects upon a popular democracy.

Public disclosure, in short, is the least restrictive means. The compelling issue here is accountability to the people, not to another level of bureaucracy. Public disclosure is the only method[24]

(1) To inform the voters so that they may place a candidate more precisely in the political spectrum and alert the voters to those interests to which a candidate or incumbent will most likely respond; and

(2) To deter corruption by exposing an incumbent officer's financial interests and activities to a broader range of alert and informed citizens, thus making it more difficult for an

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[24]Cf. Buckley v. Valeo, supra, 424 U. S. at 66-68, 46 L.Ed.2d at 715.

official to vote his or her self-interest.

These interests cannot be achieved by any other means "less restrictive."

Disclosure also fosters a third significant state concern, that of detecting and facilitating prosecution of violations. Petitioners say this could be achieved by confidential disclosure to the Commission on Ethics.[25] This overlooks the fact, however, that in a state as politically and geographically diverse as Florida, a state agency cannot police a record-keeping operation nearly as well as can the citizens and local media in the residence of the public official.

Finally, public disclosure is essential to re-establish a measure of trust between the people and their public trustees. Disclosure to a secret Commission would only create yet another specially privileged class, yet another network of secret relationships, and therefore further under-

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[25] In their state litigation, Petitioners so far have successfully convinced Florida courts that the Commission on Ethics has no enforcement authority under the Florida Constitution against a state legislator. See Plante v. Gonzalez, 356 So.2d 1353 (Fla. 1st DCA 1978). Thus their suggestion herein that confidential disclosure to the Commission will facilitate prosecution of violations by state legislators is indeed inconsistent.

mine the confidence of the people of Florida in their government.

Regardless of the name to be applied to the test used, the Fifth Circuit recognized that the substantial interest in informing the electorate could be met in no way other than public disclosure:

> This educational feature of the Amendment [public disclosure] serves one of the most legitimate of state interests: it improves the electoral process. That goal, recognized as important by the Supreme Court in Buckley, can be met in no other way. That goal justifies public publication of the senators' financial statements.

Plante v. Gonzalez, 575 F.2d at 1137.

Thus, for this final reason, the decision of the Fifth Circuit herein is correct and does not involve a question of federal law of great significance.

III.

PETITIONERS' ATTEMPT TO ASSERT THE ALLEGED PRIVACY RIGHTS OF THIRD PARTIES IS PREMATURE.

Petitioners' complaint does not allege that the privacy interests of "clients, customers and business associates" are at stake. The only reference in Petitioners' complaint to third persons is

to family members: ". . . his parents, his brothers, and his family . . . ." (Petitioners' Brief, p. 52-53) Thus, it is inappropriate for Petitioner herein to assert the alleged privacy interests of "clients of attorneys, the patients of physicians and psychiatrists and the prescription drug users of pharmacists." (Petitioners' Brief, page 12.)

But there is an even more fundamental reason why this parade of horribles is not before the Court: disclosure of the identity of such third persons is highly speculative in view of the rules of the Commission on Ethics governing secondary source of income disclosure.[26] The identity of clients or customers of a "business entity" which provides income to the public officer need be disclosed only if the following tests are met:

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[26]Rule 34-8.05(2), Fla. Admin. C., adopted April 4, 1977, provides:

> (2) A "secondary source of income" shall mean any one customer, client or other source of income which provides in excess of 10% of the total income of a business entity, as shown on that business entity's most recently filed income tax return, during the previous tax year in which a person subject to full and public disclosure of financial interests own in excess of five percent (5%) of the business entity's total assets or capital stock and from which such person derived in excess of $1,000 income during the previous tax year.

> 1. The customer or client is a major source of income to the "business entity," providing in excess of 10% of the business entity's annual income; and
>
> 2. The public officer owns in excess of 5% of the business entity's total assets or capital stock; and
>
> 3. The public officer receives in excess of $1,000 income annually from the business entity.

"Business entity" is defined by §112.312(3), Fla. Stat. to include sole proprietorships, self-employed individuals, as well as corporations or partnerships.

Most attorneys or physicians derive income from "business entities" in the form of partnerships or professional services corporations, but even the self-employed practioner's "business entity" is covered by the above definition. Physicians typically have far more than 10 patients per year, so it is highly unlikely that any one patient will provide in excess of 10% of the income to the physician's "business entity." Lawyers may have one or two such major clients, but often these are quite well-known through representation before public tribunals. Indeed, some of the major clients who have (in Petitioners' words, page 55, Petitioners' Brief) chosen to utilize the "lawyering talents of Senator Barron" are listed as clients of Petitioner's law firm in Martindale-Hubbell, pages 1431B - 1432B.

Disclosure of "prescription drug users of pharmacists" (there are no such Plaintiffs herein) could never occur since pharmacists typically do not own 5% of the business entity. Of those which do, it is highly unlikely that any one drug purchaser would provide over 10% of the annual income to the drug store or pharmacy.

Thus, even if Petitioners' complaint had attempted to assert privacy claims of clients, patients, and drug purchasers, such claims would be extremely hypothetical and premature. Relevant here is California Bankers Ass'n., supra, where the Court ruled it unnecessary to determine whether bank plaintiffs had standing to assert privacy of third-party bank depositors because

> . . . in any event, the claim is premature.

416 U.S. at 51, 39 L.Ed.2d at 835. See also Ass'n of American Physicians and Surgeons v. Weinberger, 395 F.Supp. 125, 137 (N.D. Ill., E.D. 1975), aff'd per curiam, 423 U.S. 975, 46 L.Ed.2d 299, 96 S.Ct. 388 (1975), which ruled that physicians could not assert the premature privacy claims of patients.

Petitioners' reliance upon Bates v. City of Little Rock, 361 U.S. 516, 4 L.Ed. 2d 480, 80 S.Ct. 412 (1960), and N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958) for their own standing to assert privacy claims of third-parties is inappropriate. It is one thing to allow a political association

itself (the N.A.A.C.P. or Bates, its agent) to assert the First Amendment claims of its members, and wholly another to allow these individual Petitioners to speculate concerning the diverse expectations and claims of third-parties herein.

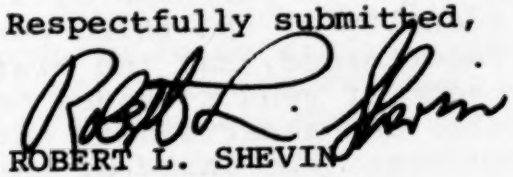
Craig v. Boren, 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451 (1976) is similarly not a relevant basis for Petitioners' standing. The claim in Craig v. Boren was denial of equal protection to a class of males ages 18-20 who were entirely precluded from purchase of 3.2% beer. Thus, the identity of the third party was fixed and ascertained, and the claim - the total severance of vendor-vendee nexus - was singular and ascertained, not hypothetical. In contrast, the shape of third-persons' claims to privacy and the identity of such persons in the case at bar remains theoretical rather than concrete. Petitioners ought not have standing to assert such premature claims.

The Fifth Circuit thus was correct that such particularized claims should not be resolved upon this facial challenge to the Sunshine Amendment, and should await another day.

CONCLUSION

The decisions below are in accord with the overwhelming majority of courts which have closely considered public financial disclosure laws against federal privacy claims. But more important, the decisions below have correctly understood and applied the decisions of this Court. The occasion, therefore, for review by certiorari is not presented herein, and the petition should be denied.

Respectfully submitted,



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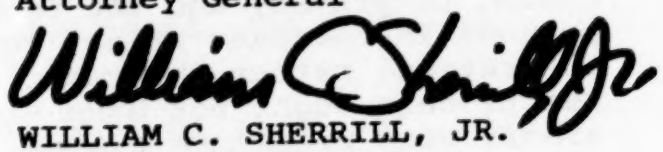

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was this 22nd day of December, 1978, served upon the following persons:

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